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## Reverse Age Discrimination Under the Age Discrimination in Employment Act: Protecting All Members of the Protected Class

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## REVERSE AGE DISCRIMINATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT: PROTECTING ALL MEMBERS OF THE PROTECTED CLASS\*

Company C, an advertising agency with sixty employees, is publicly criticized for lacking diversity in personnel because all employees are between the ages of twenty-two and thirty-five. When C gains a new account with Second Spring, a manufacturer of arthritis medications, it creates a new position to handle the workload. Applicants A and B, both with twenty years advertising experience, apply for the position. A is forty years old and B is fifty. While C thinks both A and B will do an excellent job, C selects B because B is older. C believes that B's age will help company image by creating diversity and that B will better understand the interests of an older audience because B is older.

Company X likes to use older workers as "greeters" in visible positions within its stores to promote X as a "community place." To foster this image, X only promotes interested retirement-age employees to greater positions at X's stores. D, age fifty-five, and E, age sixty-five, have both worked for X since the company's inception. Both D and E would like to reduce their work responsibilities in preparation for retirement, and so both apply for a greater position when it becomes available. X chooses E over D for the position because E's advanced age best serves the X image.<sup>1</sup>

### I. INTRODUCTION

Age discrimination in the workplace is predominantly perceived as an older person losing a job opportunity to a younger person.<sup>2</sup> Opponents of these adverse employment decisions criticize employers

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\* Prior to the publication of this Note, the Supreme Court granted certiorari to hear *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466 (6th Cir. 2002). At press time, the Court had not yet issued an opinion on *Cline*.

<sup>1</sup> The hypotheticals presented are the product of the author's imagination and are not based on actual cases in whole or in part.

<sup>2</sup> See, e.g., THE BUREAU OF NAT'L AFFAIRS, INC., OLDER AMERICANS IN THE WORKFORCE: CHALLENGES AND SOLUTIONS 123-45 (1987); RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE (2001); Barry Bennett Kaufman, *Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act*, 56 S. CAL. L. REV. 825 (1983).

for acting based on a stereotype of older workers.<sup>3</sup> For example, an employer might view the older worker as less trainable, less efficient, or more costly to employ than a relatively younger worker.<sup>4</sup> However, age discrimination in the workplace takes many forms.<sup>5</sup> Common discriminatory practices range from the explicit age-based hiring or firing to the more subtle reduction in force that gradually phases older employees out of the workforce.<sup>6</sup> Age discrimination also includes the purely age-based decisions described in the hypotheticals above, in which an older hiree or employee is favored specifically to benefit company image or because of a stereotype that older people can best serve older people.

Congress enacted the Age Discrimination in Employment Act<sup>7</sup> (“ADEA”) in 1967 specifically to protect employees from adverse employment decisions grounded in age-based stereotypes.<sup>8</sup> In recognition that age discrimination can begin as early as age forty, Congress included “any individual” age forty and older within the Act’s protected group.<sup>9</sup> However, Congress refrained from naming which employer actions constitute “discriminatory practices” because of the broad range of circumstances in which age discrimination can occur.<sup>10</sup>

Today, the baby boomer generation has achieved middle-age.<sup>11</sup> The youngest boomers will reach age forty and the oldest will be sixty in the year 2006.<sup>12</sup> This population currently represents approximately forty-nine percent of the American workforce.<sup>13</sup> Better educated than previous generations, these boomers are anticipated to increase litigation under

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<sup>3</sup> See GREGORY, *supra* note 2, at 16-30; Kaufman, *supra* note 2, at 827-28; see also *infra* text accompanying notes 35-37.

<sup>4</sup> See GREGORY, *supra* note 2, at 22-24 (summarizing common age-based stereotypes).

<sup>5</sup> See *infra* note 60 and accompanying text (recognizing the need for a case-by-case analysis of age discrimination claims because of the multitude of unique ways in which such discrimination can occur); see also *infra* Part II.C.

<sup>6</sup> See generally GREGORY, *supra* note 2, at 31-101 (illustrating discriminatory reductions in force; early retirement plans; and hiring, promotion, demotion, and transfer systems).

<sup>7</sup> 29 U.S.C. §§ 621-634 (2000).

<sup>8</sup> See *infra* text accompanying notes 35-39.

<sup>9</sup> See *infra* note 39 and text accompanying note 48.

<sup>10</sup> See *infra* note 60.

<sup>11</sup> See *infra* text accompanying notes 12-14.

<sup>12</sup> See GREGORY, *supra* note 2, at 9-10.

<sup>13</sup> *Id.* at 10.

the ADEA as they actively respond to perceived acts of age discrimination at work.<sup>14</sup>

The theory of reverse age discrimination within the protected group, or a younger worker over age forty losing a job opportunity to a relatively older worker, is one area of ADEA law rapidly evolving in response to pressure from baby boomers.<sup>15</sup> In the last fifteen years, federal courts have dealt with a succession of reverse discrimination suits challenging everything from typical hiring and firing decisions to age-based provisions in collective bargaining agreements and early retirement programs.<sup>16</sup> The Seventh Circuit and several lower federal courts have refused to acknowledge reverse discrimination as a theory of recovery under the ADEA.<sup>17</sup> However, the Sixth Circuit recently split from the Seventh Circuit to hold that the ADEA does support such a claim.<sup>18</sup>

This Note argues that the ADEA contemplates relief for victims of reverse age discrimination who are also members of the Act's protected class.<sup>19</sup> Part II describes the evolution of ADEA law, beginning with the statutory history of the Act, continuing with the Act's purpose, and ending with a discussion of ADEA reverse age discrimination jurisprudence.<sup>20</sup> Part III outlines the split between the Sixth and Seventh Circuits over reverse age discrimination.<sup>21</sup> Part IV analyzes the Act's accommodation of reverse age discrimination in light of the statute's language, history, and policy, and further concludes that the Equal Employment Opportunity Commission ("EEOC") regulation interpreting the Act's nondiscrimination mandate does not exceed the statute's scope.<sup>22</sup> Part IV also evaluates the conflict between the Sixth and Seventh Circuits in light of these conclusions.<sup>23</sup> Part V suggests model judicial reasoning for analyzing a reverse age discrimination claim under the ADEA.<sup>24</sup> Through the process outlined above, this Note advocates that only by recognizing protected class reverse age

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<sup>14</sup> *Id.*

<sup>15</sup> *See infra* text accompanying notes 16-18.

<sup>16</sup> *See infra* Parts II.C, III.

<sup>17</sup> *See infra* notes 101-07 and accompanying text.

<sup>18</sup> *See infra* notes 108-12 and accompanying text.

<sup>19</sup> *See infra* text accompanying notes 20-24.

<sup>20</sup> *See infra* Part II.

<sup>21</sup> *See infra* Part III.

<sup>22</sup> *See infra* Part IV.A-B.

<sup>23</sup> *See infra* Part IV.C.

<sup>24</sup> *See infra* Part V.

discrimination claims can a court most fully effectuate the purposes of the Act: preventing arbitrary age discrimination and providing employment opportunities for older workers.

## II. EVOLUTION OF ADEA LAW LEADING TO REVERSE AGE DISCRIMINATION WITHIN THE PROTECTED CLASS

Reverse age discrimination is best understood as the product of an evolving civil rights jurisprudence.<sup>25</sup> First, this Part traces the development of reverse age discrimination under the ADEA within the broader context of civil rights legislation.<sup>26</sup> Next, this Part outlines the purposes of the Act, as well as the potential conflict between those purposes.<sup>27</sup> Finally, this Part discusses the role of reverse discrimination as a theory of relief within the federal courts today.<sup>28</sup>

### A. Statutory History of the ADEA

In response to growing civil rights awareness in the 1960s, Congress enacted significant legislation designed to counteract discriminatory employment practices.<sup>29</sup> The first of this legislation, Title VII of the Civil Rights Act of 1964<sup>30</sup> ("Title VII"), specifically targeted employment discrimination on the basis of "race, color, religion, sex, or national origin."<sup>31</sup> During the debates for Title VII, members of both the House of Representatives and the Senate encouraged Congress to add "age" to the prohibited criteria for employment decisions.<sup>32</sup> However, based on the distinction that age, unlike race or sex, is not an immutable characteristic,

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<sup>25</sup> See *infra* text accompanying notes 26-28.

<sup>26</sup> See *infra* Part II.A.

<sup>27</sup> See *infra* Part II.B.

<sup>28</sup> See *infra* Part II.C.

<sup>29</sup> See GREGORY, *supra* note 2, at 16-22; JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW 1-3 (2d ed. 1990); see also H.R. REP. NO. 805, at 1 (1967), reprinted in 1967 U.S.C.C.A.N. 2213, 2214.

<sup>30</sup> 42 U.S.C. §§ 2000e-2000e-17 (2000).

<sup>31</sup> See *id.* § 2000e-2(a). The overall goal of the Civil Rights Act of 1964 was to "achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations." S. REP. NO. 872, at 1 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2355.

<sup>32</sup> See Bryan B. Woodruff, Note, *Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967*, 73 IND. L.J. 1295, 1296-97 (1998) (noting that proposals to add "age" to the Civil Rights Act by Representative John Dowdy and by Senator George Smathers were struck down in each house, respectively); see also H.R. REP. NO. 805, at 1, reprinted in 1967 U.S.C.C.A.N. 2214.

Congress did not include age within the Title VII protected groups.<sup>33</sup> Nevertheless, Congress ordered the Secretary of Labor, Willard Wirtz, to study the problem of age discrimination to determine whether it should be included in a future amendment to the Civil Rights Act.<sup>34</sup>

In the resulting report, *The Older American Worker – Age Discrimination in Employment*, Secretary Wirtz recommended that Congress act to eliminate arbitrary age discrimination.<sup>35</sup> The Secretary explained that an unfounded assumption that older workers were less productive or less able than younger workers was significantly burdening the economy as well as causing psychological harm to unemployed older individuals.<sup>36</sup> However, he also determined that age, which can sometimes affect job performance, should be considered separately from race and gender, which do not.<sup>37</sup> Following an endorsement of the ADEA by President Lyndon B. Johnson, the

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<sup>33</sup> See KALET, *supra* note 29, at 2; Tara Van Ausdall, Note, *O'Connor v. Consolidated Coin Caterers Corp.: Can an ADEA Plaintiff Ever Win?*, 33 TULSA L.J. 643, 652 (1997).

<sup>34</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265-66 (1964) (“The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.”).

<sup>35</sup> See H.R. REP. NO. 805, at 2, *reprinted in* 1967 U.S.C.C.A.N. 2214 (“A clear cut and implemented Federal policy . . . would provide a foundation for a much-needed vigorous, nationwide campaign to promote hiring without discrimination on the basis of age.”). The report, which dealt with workers age forty-five and older, focused primarily on age-restrictive hiring policies commonly practiced by employers. See Woodruff, *supra* note 32, at 1297. Secretary Wirtz recommended four actions to end such practices:

First: *Action to eliminate arbitrary discrimination in employment.*

Second: *Action to adjust institutional arrangements which work to the disadvantage of older workers.*

Third: *Action to increase the availability of work for older workers.*

Fourth: *Action to enlarge educational concepts and institutions to meet the needs and opportunities of older age.*

Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. RICH. L. REV. 579, 582-83 (1997). These actions do not necessarily suggest that Congress did not intend the ADEA to reach reverse discrimination. *Cf. Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 474 (6th Cir. 2002) (Cole, J., concurring), *cert. granted*, 123 S. Ct. 1786 (2003).

<sup>36</sup> See Woodruff, *supra* note 32, at 1297.

<sup>37</sup> See Van Ausdall, *supra* note 33, at 652 (quoting the Secretary's statement that “age is one minority group in which . . . all seek . . . eventual membership”); see also Eglit, *supra* note 35, at 582-83 (quoting substantially from the Secretary's report on the characteristics of age discrimination and the actions recommended to prevent it).

Secretary submitted the proposed act to Congress, which later ratified it as part of the Fair Labor Standards Act<sup>38</sup> ("FLSA") in 1967.<sup>39</sup>

Within the United States, the ADEA applies to private employers with twenty or more employees, employment agencies, labor organizations, and the federal government.<sup>40</sup> The provisions of the ADEA applicable to private employers have undergone two major alterations in the Act's nearly forty-year lifespan.<sup>41</sup> First, Congress enacted several amendments to raise, and ultimately abolish, the upper age limit of the Act's protected class.<sup>42</sup> While the ADEA originally protected employees between the ages of forty and sixty-five,<sup>43</sup> in 1978, Congress raised the upper limit to seventy in response to concerns that

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<sup>38</sup> 29 U.S.C. §§ 201-219 (2000). The purpose of the FLSA is to correct and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Id.* § 202(a).

<sup>39</sup> See H.R. REP. NO. 805, at 2, reprinted in 1967 U.S.C.C.A.N. 2214. President Johnson endorsed the ADEA in his Older American message, in which he noted that employees age forty-five and older comprised twenty-seven percent of the unemployed in 1967. *Id.* This position reflects the original bill's prohibition of discrimination against employees age forty-five to sixty-five. *Id.* at 6-7, reprinted in 1967 U.S.C.C.A.N. 2219. The forty-five-year-old threshold was lowered to forty by Congress prior to the passage of the ADEA, upon a finding that age discrimination in employment became apparent at that age. See STAFF OF SENATE SPECIAL COMM. ON AGING, 95TH CONG., THE NEXT STEPS IN COMBATING AGE DISCRIMINATION IN EMPLOYMENT: WITH SPECIAL REFERENCE TO MANDATORY RETIREMENT POLICY 5 (Comm. Print 1977) [hereinafter NEXT STEPS].

<sup>40</sup> 29 U.S.C. §§ 630(b)-(d), 633a(a). The ADEA also protects U.S. citizens employed overseas by American employers or corporations controlled by American employers. See H. Lane Dennard, Jr. & Kendall L. Kelly, *Price Waterhouse: Alive and Well Under the Age Discrimination in Employment Act*, 51 MERCER L. REV. 721, 724 (2000). Originally, the ADEA applied only to employees in the private sector but was extended to protect government employees in 1974. See NEXT STEPS, *supra* note 39, at 7.

Employers to which the ADEA applies are still subject to state age discrimination laws. See 29 U.S.C. § 633. The ADEA does not pre-empt state law but does require that an ADEA plaintiff suspend any state age discrimination claim until the ADEA claim is resolved. *Id.* § 633(a); see also S. REP. NO. 95-493, at 5-7 (1977), reprinted in 1978 U.S.C.C.A.N. 504, 508-10 (explaining the federal-state relationship). As a second condition, a plaintiff who first files a state discrimination claim must wait sixty days before filing an ADEA claim unless the state claim has terminated. See 29 U.S.C. § 633(b); see also S. REP. NO. 95-493, at 5-7, reprinted in 1978 U.S.C.C.A.N. 508-10.

<sup>41</sup> See *infra* notes 42-45 and accompanying text.

<sup>42</sup> See *infra* text accompanying notes 43-45.

<sup>43</sup> See Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, 607 (1967). Although airline stewardesses required to retire at the age of thirty-two presented a compelling reason to reduce the age minimum further, Congress declined to do so out of concern that lowering the minimum would weaken the ADEA's primary purpose of "the promotion of employment opportunities for older workers." H.R. REP. NO. 805, at 6, reprinted in 1967 U.S.C.C.A.N. 2219.

employers were mandating retirement after age sixty-five.<sup>44</sup> In 1986, Congress amended the ADEA again to remove the upper age limit altogether.<sup>45</sup> The second shift in the ADEA was organizational. In 1978, Congress moved enforcement responsibilities from the Department of Labor to the EEOC.<sup>46</sup>

Substantively, the ADEA mirrors Title VII, merely replacing the words "race, color, religion, sex and national origin" with "age."<sup>47</sup> The ADEA also retains the neutral terminology of Title VII, prohibiting

<sup>44</sup> See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978); see also S. REP. NO. 95-493, at 7, *reprinted in* 1978 U.S.C.C.A.N. 510; NEXT STEPS, *supra* note 39, at 5, 8; KALET, *supra* note 29, at 7-9. Due to a lack of information regarding the impact of unemployment on those older than age seventy, Congress was not prepared to entirely abolish the age limit. S. REP. NO. 95-493, at 7, *reprinted in* 1978 U.S.C.C.A.N. 510. However, Congress felt that raising the age limit would still substantially reduce the effects of mandatory retirement. *Id.*

<sup>45</sup> See Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986); see also KALET, *supra* note 29, at 11-12. Congress removed the age limit in an effort to eliminate mandatory retirement, which had not been satisfactorily remedied by the 1978 amendments. See generally H.R. REP. NO. 99-756 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5628. The ADEA now protects "individuals who are at least 40 years of age." 29 U.S.C. § 631(a).

<sup>46</sup> See Kaufman, *supra* note 2, at 834-35. For an explanation of the Reorganization Plan that transferred enforcement authority to the EEOC, see Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 66-68.

<sup>47</sup> Compare 42 U.S.C. § 2000e-2(a) (2000) (Title VII), with 29 U.S.C. § 623(a)(1)-(2) (ADEA). See also Dennard & Kelly, *supra* note 40, at 724-27. Title VII states that it is unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). By comparison, the ADEA makes it unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

29 U.S.C. § 623(a)(1)-(2).



discriminatory employment practices with respect to “any individual . . . because of such individual’s age.”<sup>48</sup> As a third substantive similarity to Title VII, the ADEA broadly prohibits discrimination in the areas of “hiring, discharges, treatment during employment, advertising, and retaliation.”<sup>49</sup> However, the ADEA provides several exceptions that enable an employer to consider age.<sup>50</sup> In § 623(f), the ADEA permits an employer to consider age when it is “a bona fide occupational qualification, . . . to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this [Act, and] to observe the terms of a bona fide employee benefit plan.”<sup>51</sup> With each of these

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<sup>48</sup> *Id.* § 623.

<sup>49</sup> See Dennard & Kelly, *supra* note 40, at 726.

<sup>50</sup> See *infra* notes 51-52 and accompanying text.

<sup>51</sup> See 29 U.S.C. § 623(f), which permits an employer:

(1) to take any action otherwise prohibited [by] this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . .

(2) to take any action otherwise prohibited [by] this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual . . . because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker . . . ; or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

*Id.* § 623(f). Congress added the seniority system and employee benefit plan exceptions as amendments to the ADEA through the Older Worker Benefit Protection Act (“OWBPA”) in 1990. See generally Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990). OWBPA also permitted employers to set a minimum age for retirement benefits connected with pension plans. *Id.* This provision is codified in § 623(f)(1)(A) of the ADEA. *Id.*

Congress enacted OWBPA to overrule the Supreme Court’s decision in *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), in which the Court “held that the ADEA permitted arbitrary age discrimination in employee benefit plans.” S. REP. NO. 101-263, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1510. Congress intended OWBPA to clarify that “discrimination on the basis of age in virtually all forms of employee benefits is unlawful.” *Id.* at 5, *reprinted in* 1990 U.S.C.C.A.N. 1510. The Senate Report accompanying OWBPA emphasized that benefit reductions may only be justified by corresponding cost increases to cover older workers. See *id.* at 5-16, *reprinted in* 1990 U.S.C.C.A.N. 1510-21.

exceptions, the employer may not use age as the *sole* criterion in its employment decision.<sup>52</sup>

In contrast to the substantive provisions of the ADEA, the Act's remedial and procedural provisions originally paralleled those of the FLSA, rather than Title VII.<sup>53</sup> For example, the right to a jury trial available under the ADEA only became available to Title VII plaintiffs in 1991.<sup>54</sup> Although the 1991 amendments to Title VII brought the statute into greater alignment with the ADEA, an ADEA plaintiff still has individual remedies distinct from those available under Title VII.<sup>55</sup> For example, an ADEA plaintiff may receive liquidated damages for an employer's willful violations, but a Title VII plaintiff may only claim compensatory and punitive damages.<sup>56</sup> Additionally, reasonable attorneys' fees are mandatory under the ADEA but only discretionary under Title VII.<sup>57</sup> Finally, ADEA class action suits and waiver of age claims follow the provisions set forth in the FLSA, rather than in Title VII.<sup>58</sup>

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<sup>52</sup> See 29 U.S.C. § 623(f); see, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120-21 (1985) ("[I]f TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this opportunity to others because of their age."); *Karlen v. City Colls. of Chi.*, 837 F.2d 314, 318-19 (7th Cir. 1988) (concluding that qualification for an early retirement plan may not be based solely on age); *Miss. Power & Light Co. v. Local Union Nos. 605 & 985, Int'l Bhd. of Elec. Workers*, 945 F. Supp. 980, 985 (S.D. Miss. 1996) (holding that a workplace transfer provision facially violates the ADEA by using age as the sole criterion), *aff'd*, 102 F.3d 551 (5th Cir. 1996); S. REP. NO. 101-263, at 5-16, reprinted in 1990 U.S.C.C.A.N. 1510-21.

<sup>53</sup> See *Dennard & Kelly*, *supra* note 40, at 725-32; *supra* note 38 (stating the purpose of the FLSA).

<sup>54</sup> See *Dennard & Kelly*, *supra* note 40, at 725-32.

<sup>55</sup> *Id.*; see *infra* notes 56-57 and accompanying text.

<sup>56</sup> See *Dennard & Kelly*, *supra* note 40, at 728-29.

<sup>57</sup> *Id.* Under the ADEA, only plaintiffs may recover attorneys' fees. See 29 U.S.C. § 626(b); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971). Under Title VII, both plaintiffs and defendants can recover fees, but under different standards. See, e.g., *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). As a practical matter, there is little difference between the mandatory nature of attorneys' fees under the ADEA and the discretionary nature of the fees under Title VII. *Cf. id.* at 415-17. A court will generally award attorney fees to a Title VII plaintiff unless special circumstances render the award unjust. *Id.* A prevailing Title VII defendant can receive fees if the plaintiff's complaint was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421.

<sup>58</sup> See *Dennard & Kelly*, *supra* note 40, at 731-32.

B. Purpose of the ADEA

The ADEA has two primary purposes: (1) to "prohibit arbitrary age discrimination in employment" and (2) to "promote employment of older persons based on their ability rather than age."<sup>59</sup> In the administration of these goals, Congress has indicated that courts must treat each ADEA case on an individual basis, rather than making broad assumptions about what types of activities are or are not permissible.<sup>60</sup>

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<sup>59</sup> 29 U.S.C. § 621(b) (the Congressional statement of findings and purpose). The third listed purpose is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* The findings on which these purposes rest are:

The Congress hereby finds and declares that—

- (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
- (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
- (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
- (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

*Id.* § 621(a); see also H.R. REP. NO. 805, at 4 (1967), reprinted in 1967 U.S.C.C.A.N. 2213, 2217. The Congressional reports that accompanied the 1978 and 1986 amendments also stated the Act's purpose in this dual manner. See generally H.R. REP. NO. 99-756 (1986), reprinted in 1986 U.S.C.C.A.N. 5628; S. REP. NO. 95-493 (1977), reprinted in 1978 U.S.C.C.A.N. 504. For example, in the Senate report accompanying the 1978 amendments, the Senate placed equal value on all three prongs of the published Statement of Findings and Purpose, although it seemed to support its argument for raising the protected class maximum age to seventy on the grounds that mandatory retirement was arbitrary discrimination. S. REP. NO. 95-493, at 2-3, reprinted in 1978 U.S.C.C.A.N. 506 ("A person with the ability and desire to work should not be denied that opportunity solely because of age."). For an illustration of how the Department of Labor harmonized these purposes to Congress' approval with regard to employee benefits that differentiate based on age, see S. REP. NO. 101-263, at 8 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1512-13.

<sup>60</sup> See H.R. REP. NO. 805, at 7, reprinted in 1967 U.S.C.C.A.N. 2220. In the House report accompanying the original bill, Congress noted that "[t]he case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions." *Id.* Several courts have also suggested that age discrimination claims must be evaluated on a case-by-case basis because age is a relative, rather than absolute, characteristic. See, e.g., *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1428 (7th Cir. 1986) (recommending a case-by-case approach to determine whether an employer's method of

Nevertheless, as preventing arbitrary discrimination and aiding older workers are not necessarily synonymous, application of the ADEA statement of purpose has led to disagreements over Congress' intent.<sup>61</sup>

In his 1983 article, Barry Bennett Kaufman illustrated the potential conflict between eliminating arbitrary age discrimination and promoting the employment of older workers by explaining that the legislative

paying retirement benefits is a bona fide employee benefit plan under the ADEA); *Rock v. Mass. Comm'n Against Discrimination*, 424 N.E.2d 244, 248 (Mass. 1981) ("Because age is a relative rather than absolute status when taken as a basis for discrimination, it need not follow that all persons protected by the Act ADEA should be grouped together for purposes of delineating the extent of their protection.") (quoting *Moore v. Sears, Roebuck & Co.*, 464 F. Supp. 357, 366 (N.D. Ga. 1979)).

<sup>61</sup> See *infra* notes 62-69 and accompanying text; *infra* Part III. In addition to disagreeing over congressional policy and statutory interpretation of § 623, courts have not consistently interpreted the age forty limit in § 631(a) of the statute. See, e.g., *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 469 (6th Cir. 2002) (criticizing the district court's interpretation of § 631 as requiring that the plaintiff be both over age thirty-nine and relatively older than the replacement), *cert. granted*, 123 S. Ct. 1786 (2003); *Brown v. Oscar Mayer Foods Corp.*, No. 94-C3759, 1996 U.S. Dist. LEXIS 2554, at \*10 (N.D. Ill. Mar. 5, 1996) (holding that the age forty limit precludes reverse discrimination claims asserted by plaintiffs younger than the protected class); *Conn v. First Union Bank of Va.*, No. 94-0901-R, 1995 U.S. Dist. LEXIS 9242, at \*3 (W.D. Va. Mar. 17, 1995) (interpreting the age forty limit to mean that Congress did not anticipate claims of reverse age discrimination).

Reliance on the age forty limit as a bar to reverse discrimination has also led to some bizarre results in comparisons between the ADEA and state discrimination laws. For example, a Michigan court held that a section of the Michigan Civil Rights Act prohibiting employment discrimination "against any individual . . . because of . . . age" should allow claims for reverse discrimination. *Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W.2d 858, 860-61 (Mich. Ct. App. 1999) (following earlier case precedent rejecting reverse discrimination claims but commenting that the precedent was in error), *rev'd on reh'g*, 612 N.W.2d 845 (Mich. Ct. App. 2000) (approving of the previous panel's discussion of reverse discrimination). This language is virtually indistinguishable from the language in the ADEA, which also bars discrimination against "any individual . . . because of such individual's age." 29 U.S.C. § 623. In order to distinguish its decision from prior ADEA cases decided by the Seventh Circuit that had rejected reverse discrimination, the Michigan Court of Appeals noted that the Michigan Civil Rights Act contained no similar limitation on the plaintiff's age. See *Zanni*, 612 N.W.2d at 860-61. In light of the Michigan statute's unlimited protected class, the court concluded, "[W]e believe that the [Michigan] Legislature expressed an intent to prohibit employers from engaging in discriminatory practices against workers considered 'too young' as well as workers considered 'too old.'" *Id.* at 861. The court never clarified whether it considered the type of reverse discrimination barred by the ADEA to be those claims brought by members of the protected class or outside of it. See *id.* A similar analysis and result occurred in *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. 1999) (comparing New Jersey law to the ADEA). See also *Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 405 n.27 (D. Me. 1994) (comparing Maine age discrimination statutes), *aff'd*, 60 F.3d 809 (1st Cir. 1995); *State v. Indep. Sch. Dist. No. 624*, 509 N.W.2d 572 (Minn. Ct. App. 1993) (comparing Minnesota age discrimination statutes), *aff'd*, 533 N.W.2d 393 (Minn. 1995).

history supports both an allocative and nondiscrimination application of the ADEA.<sup>62</sup> In the allocative model, age may be considered in employment decisions as a means to define needs and inform discretionary decisions.<sup>63</sup> By contrast, in a nondiscrimination model, age may not be considered in making either allocative or regulatory decisions.<sup>64</sup> Because neither the Act nor its supporting legislative history defines unlawful age discrimination, and because Congress' statements of purpose regarding the Act's ban on discrimination against "any individual" do not clearly state the policy that Congress was intending to enforce, Kaufman argued that the ADEA does not clearly indicate which types of plaintiffs within the protected age group have standing to sue.<sup>65</sup>

The EEOC has also given little guidance on this issue, offering only one regulation to aid a court's determination of the rights of one member of the protected group when replaced by another.<sup>66</sup> 29 C.F.R. § 1625.2, entitled "Discrimination between individuals protected by the Act," states:

It is unlawful . . . for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.<sup>67</sup>

Both commentators and courts have recognized that a literal reading of this regulation enables members of the protected group to sue their

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<sup>62</sup> See Kaufman, *supra* note 2, at 836-42.

<sup>63</sup> *Id.* at 837-42. Kaufman argues that this framework is best for redistributing social resources. *Id.* at 837.

<sup>64</sup> *Id.* Kaufman thinks this is the best framework to combat false stereotypes or arbitrary decisions. *Id.* This model seems to match the purpose of the ADEA, although Kaufman argues that the allocative model is best. *Id.* at 855-56. For a discussion of the ADEA's goals, see *supra* note 59 and accompanying text.

<sup>65</sup> See Kaufman, *supra* note 2, at 832-36, 846.

<sup>66</sup> See *infra* notes 67-69 and accompanying text. Courts have had difficulty interpreting the breadth of this regulation. See *infra* note 69. The EEOC's own administrative adjudications have utilized regulation 1625.2 to strike down reverse discrimination practices that appear arbitrary. See, e.g., Garrett, 1997 WL 574739, at \*1-3 (E.E.O.C. Sept. 5, 1997), *aff'd*, 1999 WL 909980, at \*1-3 (E.E.O.C. Sept. 30, 1999) (using age to determine seniority violates the ADEA).

<sup>67</sup> 29 C.F.R. § 1625.2(a) (2002).

employer if replaced by someone either younger or older.<sup>68</sup> However, several courts have put a limiting construction on the statute out of concern that Congress did not intend to permit claims of “reverse discrimination” under the ADEA.<sup>69</sup>

### C. Reverse Discrimination

“Reverse discrimination” is defined as the right of a younger worker to sue his or her employer because the employer gave preferential treatment to someone older on account of age.<sup>70</sup> The theory of reverse discrimination evolved under Civil Rights Act jurisprudence.<sup>71</sup> For example, as between racial groups under Title VII, a non-minority plaintiff may successfully state a claim for relief when replaced by a minority worker.<sup>72</sup> In this manner, Title VII plaintiffs have successfully challenged employer actions that indicate a preference for traditionally disenfranchised individuals.<sup>73</sup>

<sup>68</sup> See *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1227-28 (7th Cir. 1992); *Conn v. First Union Bank of Va.*, No. 94-0901-R, 1995 U.S. Dist. LEXIS 9242, at \*5-6 (W.D. Va. Mar. 17, 1995) (“A literal reading of this regulation may support the plaintiff’s position.”); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 993 (2002); Kaufman, *supra* note 2, at 832-36.

<sup>69</sup> *Hamilton*, 966 F.2d at 1227-28 (“[T]o the extent that regulation 1625.2 can be read to authorize reverse age discrimination suits, we think that it exceeds the scope of the statute.”); *Conn*, 1995 U.S. Dist. LEXIS 9242, at \*6-7 (“To the extent the regulation could apply in this case, I agree with the Hamilton court that it exceeds the scope of the statute. Accordingly, I decline to follow it.”); *Crommie v. California*, No. C 89-4433 BAC consol. No. C 90-1150 BAC, 1993 U.S. Dist. LEXIS 4714, at \*5-6 (N.D. Cal. April 6, 1993) (limiting construction of the regulation to protect only older employees vis-à-vis younger employees). *But see La Montagne v. Am. Convenience Prods., Inc.*, 750 F.2d 1405, 1411 n.4 (7th Cir. 1984). The *La Montagne* court concluded that the regulation “merely clarified the point that an employer is not insulated from liability . . . when he chooses among people in the protected class.” *Id.* The Seventh Circuit initially read *La Montagne* narrowly to stand for the proposition that only discrimination against employees relatively older than their replacements is prohibited. *Hamilton*, 966 F.2d at 1228. Yet two years after *Hamilton*, the court returned to the *La Montagne* court’s general admonition that the regulation protects employees even when their replacement is within the protected class. *Kralman v. Ill. Dep’t of Veterans’ Affairs*, 23 F.3d 150, 155-56 (7th Cir. 1994).

<sup>70</sup> See Jeffrey Paul Fuhrman, Comment, *Can Discrimination Law Affect the Imposition of a Minimum Age Requirement for Employment in the National Basketball Association?*, 3 U. PA. J. LAB. & EMP. L. 585, 600-01 (2001).

<sup>71</sup> *Id.* In the context of the Civil Rights Act of 1964, reverse discrimination is defined as “discrimination against historically and socially favored groups.” *Craven v. Tex. Dep’t of Crim. Justice—Institutional Div.*, 151 F. Supp. 2d 757, 764 n.5 (N.D. Tex. 2001).

<sup>72</sup> See Fuhrman, *supra* note 70, at 600-01.

<sup>73</sup> *Id.*; see, e.g., *Loeffler v. Frank*, 486 U.S. 549 (1988) (awarding prejudgment interest to a male postal worker for sex discrimination under Title VII); *Zambetti v. Cuyahoga Cmty.*

Due to the similarities between Title VII and the ADEA, courts have frequently applied Title VII substantive case law to ADEA claims.<sup>74</sup> Consequently, ADEA plaintiffs have attempted application of the Title VII discrimination theories to their age discrimination claims.<sup>75</sup> The approaches taken by ADEA plaintiffs can be divided into three groups.<sup>76</sup> First, some plaintiff employees outside the protected age group (younger than forty) have attempted to establish a cause of action when replaced by a member within the protected group.<sup>77</sup> In these situations, courts have consistently held that the ADEA does not protect an employee outside the protected age group from reverse age discrimination.<sup>78</sup>

In the second category of age discrimination claims, older plaintiffs within the protected group have attempted to prove an ADEA violation

Coll., 314 F.3d 249 (6th Cir. 2002) (holding that an employer violated Title VII when the white plaintiff lost several promotions to lesser-qualified black coworkers).

<sup>74</sup> See *Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 394 (D. Me. 1994) (“Because of the similarity between the ADEA and Title VII of the Civil Rights Act, federal courts have historically applied the standards used for Title VII to ADEA.”), *aff’d*, 60 F.3d 809 (1st Cir. 1995). Despite an overall consensus that Title VII law may generally be applied to the ADEA, courts have not always agreed on the extent of the analogy. See Kaufman, *supra* note 2, at 842-46. One major disagreement in the federal courts has been over whether the ADEA parallels Title VII in allowing relief on a theory of disparate impact. See, e.g., Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 53 MERCER L. REV. 1367, 1384-85 (2002); Dennard & Kelly, *supra* note 40, at 735-36. For example, the Seventh Circuit noted that “[t]he adverse impact analysis developed in Title VII cases cannot be extended easily to age cases.” *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1428 (7th Cir. 1986). Conversely, the *Graffam* court found that the plaintiff established a prima facie case of discrimination under the Title VII disparate impact test. 870 F. Supp. at 394-405.

<sup>75</sup> See *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1227 (7th Cir. 1992). A common argument is that “age discrimination is like race or sex discrimination—it cuts both ways.” *Id.*

<sup>76</sup> See *infra* text accompanying notes 77-112.

<sup>77</sup> See, e.g., *Brown v. Oscar Mayer Foods Corp.*, No. 94-C3759, 1996 U.S. Dist. LEXIS 2554, at \*10 (N.D. Ill. Mar. 5, 1996); *Williams v. Pemberton Township Pub. Sch.*, 733 A.2d 571, 578 (N.J. Super. Ct. App. Div. 1999).

<sup>78</sup> See *Brown*, 1996 U.S. Dist. LEXIS 2554, at \*10 (“[T]he ADEA does not provide a cause of action for age discrimination claims asserted by those under age 40.”); *Williams*, 733 A.2d at 578 (“In light of the various contexts in which employment discrimination claims arise, we consider it unwise to require a plaintiff to establish unflinchingly as part of the prima facie case that plaintiff was replaced by an individual outside the plaintiff’s protected class.”).

Some plaintiffs in this category have also attempted to establish reverse discrimination when an employer’s actions have adversely affected their interests. For example, in *Brown*, plaintiffs under age forty claimed that their termination when their employer’s plant closed was orchestrated to cover up discrimination against plaintiffs over forty. 1996 U.S. Dist. LEXIS 2554, at \*3. In dismissing this theory, the court held that these plaintiffs failed to state a claim because all employees were treated equally (all were terminated), regardless of age. *Id.* at \*10-11.

when their replacement was a younger member of the protected group.<sup>79</sup> For example, a sixty-year-old might argue reverse discrimination when replaced by a forty-year-old. While this scenario is not “reverse” age discrimination, the manner in which courts have interpreted the ADEA as it relates to these plaintiffs has had a clear impact on reverse age discrimination law.<sup>80</sup> Courts initially disagreed over whether these plaintiffs had a cause of action.<sup>81</sup> The Supreme Court ultimately resolved the debate in *O’Connor v. Consolidated Coin Caterers Corp.*<sup>82</sup>

In *O’Connor*, plaintiff James O’Connor was fired at age fifty-six and replaced by a forty-year-old.<sup>83</sup> He filed suit against his employer under the ADEA, claiming that his termination was due to his age.<sup>84</sup> On appeal, the Fourth Circuit held that in order to establish a prima facie case of age discrimination, O’Connor initially had to satisfy the elements of the *McDonnell Douglas* test, a four-element test used to make a prima facie showing of discriminatory treatment in Title VII cases.<sup>85</sup> Because the court interpreted the final criteria of the test as requiring the plaintiff

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<sup>79</sup> See, e.g., *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 309-10 (1996) (replacing fifty-six-year-old with forty-year-old); *Kralman v. Ill. Dep’t of Veterans’ Affairs*, 23 F.3d 150, 152 (7th Cir. 1994) (replacing seventy-one-year-old with forty-six-year-old); *Douglas v. Anderson*, 656 F.2d 528, 530 (9th Cir. 1981) (replacing fifty-four-year-old with forty-nine-year-old).

<sup>80</sup> See *infra* text accompanying notes 81-112. The *Kralman* court noted, “[I]t is considered ‘hornbook law’ that the ADEA action can be based on discrimination between older and younger members of the protected class.” 23 F.3d at 155. The Supreme Court refined this general observation by clarifying the rights of an older employee replaced by a younger person in *O’Connor*. See 517 U.S. 308. For a discussion of how the lower federal courts have used *O’Connor*, see *infra* notes 107, 183-88 and accompanying text.

<sup>81</sup> See, e.g., *Williams*, 733 A.2d at 577-78 (listing the courts which have ruled on both sides of this issue). For example, in *Douglas*, the defendant employer urged the Ninth Circuit to adopt the rule of the Fifth Circuit that the replacement must be outside the protected class. 656 F.2d at 532. The Ninth Circuit rejected this argument, choosing instead to follow precedent that ignored this distinction. *Id.* at 532-34.

<sup>82</sup> 517 U.S. 308 (1996).

<sup>83</sup> *Id.* at 309-10.

<sup>84</sup> *Id.* at 309.

<sup>85</sup> *Id.* at 309-10. The *McDonnell Douglas* test in a Title VII context enables a plaintiff to establish a prima facie case of discrimination by showing

- (i) that he belongs to a [disfavored class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the] complainant’s qualifications.

*Id.* at 310 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).



to show replacement by someone *outside* the protected class, the court determined that the plaintiff failed to prove a prima facie case.<sup>86</sup>

Without ruling on whether the *McDonnell Douglas* test is appropriate in ADEA cases, the Supreme Court determined that the Fourth Circuit had no rational basis for requiring the former employee's replacement to be outside the protected age group.<sup>87</sup> To reach this determination, the Court looked to the ban on discrimination against "any individual . . . because of such individual's age" articulated in § 623, as well as the protective limit to employees age forty and above established by § 631 of the ADEA.<sup>88</sup> The Court noted that the language of these statutes

does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.<sup>89</sup>

Following this reasoning, the Court argued that a prima facie case requires establishing that an employment decision was based on an illegal discriminatory criterion, and not where the plaintiff's replacement fell in relation to the protected class.<sup>90</sup> The Court concluded that replacement by a person "substantially younger" than the plaintiff is a more reliable indication of age discrimination than replacement by someone outside the protected class.<sup>91</sup> Replacement by someone only insignificantly younger would not establish a prima facie case at all.<sup>92</sup>

The applicability of what courts have coined the *O'Connor* "substantially younger" test to the third category of ADEA plaintiffs is not clear.<sup>93</sup> In this category, a younger member of the protected class

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 312.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 312-13. The Court concluded that "the prima facie case requires 'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion.'" *Id.* (alteration in original) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977)).

<sup>91</sup> *Id.* at 313.

<sup>92</sup> *Id.*

<sup>93</sup> See *infra* notes 94-112 and accompanying text.

claims reverse discrimination because his or her replacement was older.<sup>94</sup> For example, a fifty-year-old may attempt to establish discrimination when replaced by a sixty-year-old. Employees commonly use this theory of discrimination to challenge the components of employer programs that create a preference for older workers, such as retirement benefits provisions.<sup>95</sup> At least one employer has also successfully used this theory to strike down a collective bargaining agreement provision keyed to employee age.<sup>96</sup>

Following *O'Connor*, the EEOC issued an Enforcement Guidance that was carefully neutral to the question of whether a plaintiff must be

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<sup>94</sup> See *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 947-48 (N.J. 1999). For example, a twenty-five-year-old plaintiff successfully asserted a reverse age discrimination claim against his employer when he was fired and replaced by a thirty-one-year-old in *Bergen*. *Id.* This case was decided under a New Jersey discrimination law comparable to the ADEA but that did not limit its coverage to employees over age forty. *Id.* at 949-50.

<sup>95</sup> See, e.g., *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 468 (6th Cir. 2002) (challenging a collective bargaining agreement that removed eligibility for full health benefits upon retirement for plaintiffs age forty to forty-nine), *cert. granted*, 123 S. Ct. 1786 (2003); *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1227 (7th Cir. 1992) (alleging that plaintiffs between ages forty and fifty were too young to receive early retirement benefits when plants closed); *Greer v. Pension Benefit Guar. Corp.*, No. 00 Civ. 1272 (SAS), 2001 U.S. Dist. LEXIS 1382, at \*1, 9-10 (S.D.N.Y. Feb. 15, 2001) (alleging that a pension program was unlawful because older employees who had worked for fewer years received a higher percentage of pension benefits than did fifty-three-year-old plaintiff); *Dittman v. Gen. Motors Corp. — Delco Chassis Div.*, 941 F. Supp. 284, 286 (D. Conn. 1996) (objecting to plant closing agreement that made early retirement available only to those over age fifty, to the exclusion of plaintiffs between ages forty and fifty), *aff'd*, 116 F.3d 465 (2d Cir. 1997); *Conn v. First Union Bank of Va.*, No. 94-0901-R, 1995 U.S. Dist. LEXIS 9242, at \*1-2 (W.D. Va. Mar. 17, 1995) (alleging age discrimination towards plaintiffs between the ages of forty and fifty-five when employer discontinued Executive Life Insurance Program for employees under age fifty-five); *Wehrly v. Am. Motors Sales Corp.*, 678 F. Supp. 1366, 1380-81 (N.D. Ind. 1988) (challenging Early Retirement program that was only available to employees age fifty-five and older with ten years of service, to the exclusion of fifty-four-year-old plaintiff); *Isabella*, 1995 WL 653513 (E.E.O.C. Oct. 19, 1995) (challenging early retirement program benefiting employees age fifty-five and older, to the exclusion of plaintiffs under the age of fifty-five); *Dupriest*, 1994 WL 735178 (E.E.O.C. May 2, 1994) (challenging early retirement program benefiting employees age fifty and over, to the exclusion of forty-five-year-old plaintiff).

<sup>96</sup> See *Miss. Power & Light Co. v. Local Union Nos. 605 & 985, Int'l Bhd. of Elec. Workers*, 945 F. Supp. 980, 981-82 (S.D. Miss. 1996) (challenging a collective bargaining agreement provision that allowed disabled employees between the ages of sixty and sixty-five and with thirty years of service to resist transfer of location), *aff'd*, 102 F.3d 551 (5th Cir. 1996). The *Miss. Power & Light Co.* court concluded that the provision facially violated the ADEA. *Id.* at 985.

replaced by someone younger in order to have a viable claim.<sup>97</sup> Within the Enforcement Guidance, the EEOC stated that the replacement's age is not relevant in establishing a prima facie case.<sup>98</sup> Furthermore, the EEOC broadly interpreted the *O'Connor* holding to be: "[W]hen the age of a replacement is made a part of the prima facie case, that case is not defeated solely because the replacement happens to be within the protected age group."<sup>99</sup> The EEOC's neutral stance parallels the courts' unease in ruling on this issue.<sup>100</sup>

Prior to *O'Connor*, the Seventh Circuit was the only circuit court to take a pronounced stance on whether the ADEA allowed a claim for reverse discrimination within the protected class.<sup>101</sup> In *Hamilton v. Caterpillar, Inc.*,<sup>102</sup> the court concluded that no such claim could be permitted on policy grounds alone.<sup>103</sup> While acknowledged by nearly all subsequent federal circuit cases dealing with reverse discrimination within the protected class, the *Hamilton* reasoning has been critical to the holding of only a few.<sup>104</sup> Rather, the majority of courts citing *Hamilton*

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<sup>97</sup> See generally EEOC, ENFORCEMENT GUIDANCE ON O'CONNOR V. CONSOLIDATED COIN CATERERS CORP. (1996), available at <http://www.eeoc.gov/docs/oconnor.html> (last visited Nov. 25, 2003) [hereinafter GUIDANCE].

<sup>98</sup> The EEOC states:

O'Connor is consistent with the Commission's long-standing position that an ADEA charge should never be rejected or dismissed on the merits solely because a charging party states that his or her replacement (or comparator) is an individual within the ADEA's protected age group (40 and older).

Indeed, it is the Commission's view that the characteristics of the comparator are not a necessary element of the prima facie case under the ADEA.

*Id.* at Part II.2.A.

<sup>99</sup> *Id.* at Part II.3.A.

<sup>100</sup> See *infra* notes 101-07 and accompanying text.

<sup>101</sup> *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992). Prior to *Hamilton*, one district court within the Seventh Circuit expressly ruled that the ADEA did not provide a cause of action for plaintiffs claiming reverse discrimination. See *Wehrly v. Am. Motors Sales Corp.*, 678 F. Supp. 1366, 1380-83 (N.D. Ind. 1988).

<sup>102</sup> 966 F.2d 1226 (7th Cir. 1992).

<sup>103</sup> See *infra* Part III.A.

<sup>104</sup> See *Cline v. Gen. Dynamics Land Sys., Inc.*, 98 F. Supp. 2d 846 (N.D. Ohio 2000), *overruled*, 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140-41 (D. Me. 1995) (dismissing age discrimination claim because "[t]he ADEA has never been construed to permit younger persons to claim discrimination against them in favor of older persons"), *aff'd in part, rev'd in part on other grounds*, 123 F.3d 1 (1st Cir. 1997); *Conn v. First Union Bank of Va.*, No. 94-0901-R, 1995 U.S. Dist. LEXIS 9242, at \*3-7 (W.D. Va. Mar. 17, 1995).

have either given general approval for the language of the court but decided the issue before them on more secure grounds,<sup>105</sup> or they have expressly declined to rule on the question.<sup>106</sup> After *O'Connor*, only one district court has implicitly aligned the “substantially younger” test with *Hamilton* by extending the *O'Connor* holding regarding older plaintiffs replaced by younger workers to also prohibit claims by younger plaintiffs replaced by older workers.<sup>107</sup>

However, the Sixth Circuit recently rejected *Hamilton* and distinguished *O'Connor* from the protected class reverse discrimination context in *Cline v. General Dynamics Land Systems, Inc.*<sup>108</sup> Rather than evaluating the ADEA on the basis of policy, the *Cline* court utilized

The EEOC administrative adjudications that rely on *Hamilton* use the case strictly to strike down challenges to early retirement benefits programs. See, e.g., *Isabella*, 1995 WL 653513 (E.E.O.C. Oct. 19, 1995); *Dupriest*, 1994 WL 735178 (E.E.O.C. May 2, 1994). The *Dupriest* court cited *Hamilton*, but noted that the ADEA already protects early retirement programs. 1994 WL 735178, at \*3. The *Isabella* court cited *Dupriest* for this same proposition. 1995 WL 653513, at \*2.

<sup>105</sup> See *Dittman v. Gen. Motors Corp.—Delco Chassis Div.*, 941 F. Supp. 284, 286-87 (D. Conn. 1996) (concluding that under *Hamilton*, the ADEA does not provide a claim for reverse discrimination, but holding that the program in question was a bona fide employee pension benefit plan, and that as such, plaintiffs over age forty could not challenge their exclusion from it), *aff'd*, 116 F.3d 465 (2d Cir. 1997); *Brown v. Oscar Mayer Foods Corp.*, No. 94-C3759, 1996 U.S. Dist. LEXIS 2554, at \*8-11 (N.D. Ill. Mar. 5, 1996) (concluding that even if a claim for reverse discrimination were viable, the plaintiffs’ complaint failed to show they were treated differently than all other employees); *State v. Indep. Sch. Dist. No. 624*, 509 N.W.2d 572, 576 (Minn. Ct. App. 1993) (analogizing the ADEA to the Minnesota Human Rights Act) (“Because of our disposition of this case under section 465.72, and because of differences between the ADEA and the Human Rights Act, we do not directly rely on *Hamilton*. We otherwise express no opinion on the broader question of ‘reverse’ age discrimination protected under the Human Rights Act.”), *aff'd*, 533 N.W.2d 393 (Minn. 1995).

<sup>106</sup> See *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995) (declining to address the validity of the district court’s reliance on *Hamilton* and holding instead that the ADEA denied plaintiff’s claim on grounds that the plan at issue was a bona fide pension benefit plan under § 623(l)(1)(a)); *Edwards v. Bd. of Regents of the Univ. of Ga.*, 2 F.3d 382, 383 (11th Cir. 1993) (“We, however, do not decide the question of whether this kind of reverse discrimination is, as a matter of law, ever covered by the ADEA.”); *Greer v. Pension Benefit Guar. Corp.*, No. 00 Civ. 1272 (SAS), 2001 U.S. Dist. LEXIS 1382, at \*13-16 (S.D.N.Y. Feb. 15, 2001) (noting that the Second Circuit has not decided the issue, but “[e]ven if the ADEA does allow for reverse age discrimination claims, plaintiff’s claim must still fail”).

<sup>107</sup> *Mathis v. Pete Georges Chevrolet, Inc.*, No. 96-C7938, 1998 U.S. Dist. LEXIS 2458, at \*8-10 (N.D. Ill. Feb. 24, 1998). The *Mathis* court broadly concluded that *O'Connor* required only that the plaintiff be replaced by a younger person. *Id.* However, the court did not discuss the relative ages of the plaintiff and his replacements or consider the “substantially younger” language of *O'Connor*. *Id.*

<sup>108</sup> 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

principles of statutory interpretation to hold that the ADEA allows claims for reverse discrimination brought by members of the protected class.<sup>109</sup> Prior to *Cline*, several courts had suggested that the ADEA provides relief for these reverse discrimination plaintiffs.<sup>110</sup> Yet like many of the courts citing *Hamilton*, the majority of cases containing language in support of the reverse discrimination possibility were only cursory in their analysis of the issue.<sup>111</sup> Therefore, *Hamilton* and *Cline* remain the principal voices on whether the ADEA allows for reverse discrimination claims brought by members of the protected class.<sup>112</sup>

### III. CIRCUIT SPLIT

This Part establishes the basic arguments on both sides of the reverse discrimination debate through a description of the circuit split between the Sixth and Seventh Circuits.<sup>113</sup> First, this Part sets forth the Seventh Circuit decision of *Hamilton v. Caterpillar, Inc.*, holding that the ADEA bars reverse discrimination claims.<sup>114</sup> Following *Hamilton*, this Part describes the Sixth Circuit decision of *Cline v. General Dynamics Land Systems, Inc.*, holding that the ADEA supports such claims.<sup>115</sup>

#### A. The Seventh Circuit

In *Hamilton v. Caterpillar Inc.*,<sup>116</sup> the Seventh Circuit held that the ADEA did not permit reverse discrimination claims brought by members of the protected class.<sup>117</sup> Michael Hamilton, the named plaintiff in a class action against Caterpillar, claimed that Caterpillar's

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<sup>109</sup> See *id.*

<sup>110</sup> See *Brennan v. Bausch & Lomb, Inc.*, 950 F. Supp. 545, 550, 552 (E.D.N.Y. 1997); *Miss. Power & Light Co. v. Local Union Nos. 605 & 985, Int'l Bhd. of Elec. Workers*, 945 F. Supp. 980, 984-85 (S.D. Miss. 1996) ("Because this provision against transferring is keyed to an employee's age, it is facially violative of the ADEA."), *aff'd*, 102 F.3d 551 (5th Cir. 1996). In *Brennan*, the court concluded, "The plaintiff is [a] disabled male over forty, which places him in protected classes under ADEA and the ADA, and renders his reverse discrimination claim possible. . . . Although the Second Circuit has not yet ruled on the validity of this inference, the Court finds its application, even if not appropriate in all cases, is appropriate here." 950 F. Supp. at 550-52.

<sup>111</sup> See, e.g., *Brennan*, 950 F. Supp. at 551-52; *Miss. Power & Light*, 945 F. Supp. at 984-85.

<sup>112</sup> See *infra* Part III.

<sup>113</sup> See *infra* text accompanying notes 114-15.

<sup>114</sup> See *infra* Part III.A.

<sup>115</sup> See *infra* Part III.B.

<sup>116</sup> 966 F.2d 1226 (7th Cir. 1992).

<sup>117</sup> *Id.* at 1228.

Special Early Retirement Program ("SERP") violated the ADEA because it discriminated against employees between the ages of forty and fifty.<sup>118</sup>

In light of potential closings of two Iowa plants, Caterpillar had negotiated SERP with the local union representing the Iowa employees.<sup>119</sup> The plan was to go into effect if the plants closed.<sup>120</sup> Prior to SERP, Caterpillar's pension program provided pension benefits on two tiers.<sup>121</sup> First, employees age sixty or older with ten years of service were eligible to receive pension benefits.<sup>122</sup> Second, employees age fifty-five and older were eligible for benefits, provided that the combination of their age and years of service totaled eighty-five.<sup>123</sup> SERP altered this benefit program to include employees age fifty or older with ten years of service.<sup>124</sup>

By June of 1988, Caterpillar had shut down both Iowa plants and laid off all of the employees.<sup>125</sup> In 1990, Hamilton instigated a class action on behalf of employees age forty to fifty who had ten years of experience at the time of the plant closings, but who were too young to receive benefits.<sup>126</sup> The district court dismissed Hamilton's claim, holding that reverse discrimination is not prohibited by the ADEA.<sup>127</sup> However, the district court declined to rest its holding entirely on this proposition, concluding instead that even if reverse discrimination were prohibited, SERP was a bona fide employee benefit plan.<sup>128</sup>

Reviewing the case on appeal, the Seventh Circuit observed that the reverse discrimination claim was an issue of first impression for the court and looked to the language of two decisions within the Seventh Circuit and one decision by the First Circuit for guidance.<sup>129</sup> In *Karlen v.*

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<sup>118</sup> *Id.* at 1227. Hamilton's theory of discrimination is the third category of reverse discrimination plaintiffs: plaintiffs over age forty claiming a violation of the ADEA because older members of the protected group receive preferential treatment. *See supra* text accompanying note 94.

<sup>119</sup> *Hamilton*, 966 F.2d at 1226-27.

<sup>120</sup> *Id.* at 1227.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* Several other courts have performed similar maneuvers around the question of reverse discrimination. *See supra* notes 105-06 and accompanying text.

<sup>129</sup> *Hamilton*, 966 F.2d at 1227.

*City Colleges of Chicago*,<sup>130</sup> a Seventh Circuit decision, three professors claimed that an Early Retirement Program violated the ADEA by discriminating against older employees within the protected group.<sup>131</sup> The *Karlen* court concluded that, unlike Title VII's evenhanded protection for sexes and races, the ADEA did not protect all ages equally.<sup>132</sup> Similarly, the *Hamilton* court looked to the First Circuit decision in *Schuler v. Polaroid Corp.*<sup>133</sup> for the proposition that the ADEA permitted preference of older persons.<sup>134</sup> *Schuler* involved a fifty-seven-year-old plaintiff who claimed that he was constructively discharged in violation of the ADEA.<sup>135</sup> The First Circuit noted that the severance package offered to Schuler was an inappropriate basis for an age discrimination claim because it was "a carrot, not a stick," which was not forbidden by the ADEA.<sup>136</sup> Finally, the *Hamilton* court noted that in *Wehrly v. American Motor Sales Corp.*,<sup>137</sup> an Indiana federal district court conclusively held that the ADEA does not permit claims for reverse discrimination.<sup>138</sup> Taken together, the *Hamilton* court cited these three

<sup>130</sup> 837 F.2d 314 (7th Cir. 1988). *Karlen* was an appeal of summary judgment granted in favor of the defendants. *Id.* at 320.

<sup>131</sup> *Id.* at 315, 318. This fact pattern is the opposite of that facing the *Hamilton* court. See *supra* text accompanying notes 118-24. Consequently, aside from the language quoted in note 132 *infra*, the *Karlan* court focused its analysis on discrimination against relatively older employees. See *id.* at 318-20. The court concluded that the sick leave and insurance portions of the Early Retirement Plan resembled more of a stick and less of a carrot, and, therefore, summary judgment for the defendants was inappropriate. *Id.* at 320.

<sup>132</sup> *Id.* at 318. "Title VII protects whites and men as well as blacks and women, but the Age Discrimination in Employment Act does not protect the young as well as the old, or even, we think, the younger *against* the older." *Id.* The court was primarily concerned with the policy implications of permitting reverse discrimination. It argued that if "workers 40 or older but younger than the age of eligibility for early retirement could complain . . . early retirement plans would effectively be outlawed, and that was not the intent of the framers of the [ADEA]." *Id.*

<sup>133</sup> 848 F.2d 276 (1st Cir. 1988).

<sup>134</sup> *Id.* at 278. "[T]he act does not forbid treating older persons *more* generously than others." *Id.*

<sup>135</sup> *Id.* at 277-78.

<sup>136</sup> *Id.* at 278. The language in *Schuler* on which the *Hamilton* court relied, cited in note 134 *supra*, was in the context of the First Circuit's critique of the plaintiff, Schuler, basing his ADEA claim on the severance package. *Id.*

<sup>137</sup> 678 F. Supp. 1366 (N.D. Ind. 1988).

<sup>138</sup> *Hamilton*, 966 F.2d at 1227 (7th Cir. 1992). In *Wehrly*, the court granted summary judgment in favor of defendant employer when a forty-two-year-old claimed that the employer had discriminated against him when he was constructively discharged, denied a request for special early retirement, and denied a promotion. 678 F. Supp. at 1377. Citing *Karlen*, the *Wehrly* court concluded that the ADEA would place an unreasonable burden on employers if a plaintiff were able to establish a prima facie case because he was too young, rather than too old, for a benefit program. *Id.* at 1382-83.

cases for the proposition that the ADEA does not protect *younger* employees equally with *older* employees.<sup>139</sup>

Next, the court briefly turned to § 631(a) of the ADEA, which establishes the protected class of individuals age forty and older.<sup>140</sup> Contrasting reverse discrimination challenges permissible under Title VII, the court concluded that if the ADEA were intended to protect younger employees equally with older employees, there would be no reason for denying protection to employees under age forty.<sup>141</sup>

Finally, the *Hamilton* court placed a limiting construction on 29 C.F.R. § 1625.2(a) by narrowly interpreting Congress' purpose in enacting the ADEA.<sup>142</sup> The court acknowledged that both the text of the ADEA and the EEOC regulation permitted claims for reverse discrimination within the protected class.<sup>143</sup> However, the court concluded that a reading of the regulation that allowed reverse discrimination suits exceeded the scope of the ADEA.<sup>144</sup> The court then

<sup>139</sup> *Hamilton*, 966 F.2d at 1227. The court also rejected the plaintiff's comparison of age discrimination to Title VII race and gender discrimination. *Id.* For a discussion of the evolution of ADEA reverse discrimination law, see *supra* Part II.

<sup>140</sup> *Hamilton*, 966 F.2d at 1227. "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." 29 U.S.C. § 631(a) (2000).

<sup>141</sup> *Hamilton*, 966 F.2d at 1227.

If the Act were really meant to prevent reverse age discrimination, limiting the protected class to those 40 and above would make little sense. To illustrate the point, imagine that only racial minorities and women could bring suit under Title VII. If Title VII so limited the plaintiff class, we would be unlikely to read that statute to prohibit reverse discrimination, either.

*Id.*

<sup>142</sup> *Id.* at 1227-28. For the content of regulation 1625.2(a), see *supra* text accompanying note 67.

<sup>143</sup> *Hamilton*, 966 F.2d at 1227. The court stated:

[T]he Equal Employment Opportunity Commission appears to take the same view of the ADEA as *Hamilton*. . . . Moreover, there is some arguable support for this position in the statute itself. Phrases like "because of such individual's age," "on the basis of such individual's age," or "because of his age" lend themselves to an interpretation that prohibits use of age as a factor, period.

*Id.* at 1227-28.

<sup>144</sup> *Id.* at 1228. "[T]o the extent that regulation 1625.2 can be read to authorize reverse age discrimination suits, we think that it exceeds the scope of the statute." *Id.* The *Hamilton* court found only two prior cases that had interpreted regulation 1625.2(a): *La Montagne v. Am. Convenience Prods., Inc.*, 750 F.2d 1405 (7th Cir. 1984), and *Miller v. Lyng*, 660 F. Supp. 1375 (D.D.C. 1987). 966 F.2d at 1228. Both of these cases cited the regulation "for the proposition that an older plaintiff may maintain a cause of action under the ADEA even if



determined that within the context of the Congressional Statement of Findings and Purpose in § 621 of the ADEA, which refers to “older workers” and “older persons,” the phrase “arbitrary age discrimination” means Congress intended that “discriminating against *older people* on the basis of their age is arbitrary.”<sup>145</sup> Finally, the court suggested that, although the language of the statute as written is overinclusive, it was “unwilling to open the floodgates to attacks on every retirement plan because Congress chose more graceful language.”<sup>146</sup> By its interpretation of the policy Congress intended to further through the ADEA, the *Hamilton* court found that the ADEA conclusively prohibits reverse discrimination suits.<sup>147</sup>

### B. *The Sixth Circuit*

In *Cline v. General Dynamics Land Systems, Inc.*,<sup>148</sup> the Sixth Circuit held that, contrary to *Hamilton*, the ADEA allows reverse discrimination claims brought by members of the protected class.<sup>149</sup> In *Cline*, past and present employees of General Dynamics Land Systems, Inc. claimed that a health benefits provision of a collective bargaining agreement (“CBA2”) between General Dynamics and their union discriminated

his replacement is over 40.” *Id.* The *La Montagne* court read the regulation to “merely [clarify] the point that an employer is not insulated from liability for age discrimination when he chooses among people in the protected class.” 750 F.2d at 1411 n.4. The *Miller* decision lends a bit more support to the *Hamilton* court’s position. The *Miller* court said of the regulation, “[I]t is now hornbook law that the ADEA covers ‘discrimination based on age between younger and older persons within the group protected by the Act.’” 660 F. Supp. at 1378 n.2 (quoting 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 98.53, at 21-46 (rev. ed. 1986)). However, the *Miller* court also indicated that the employee’s replacement must be a significantly younger worker. *Id.*

<sup>145</sup> *Hamilton*, 966 F.2d at 1228. The court postulated that “Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young . . . cannot argue that they are similarly victimized.” *Id.* The Sixth Circuit specifically rejected this reading that the plaintiff must be both older than his replacement and within the protected class. See *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466 (6th Cir. 2002), cert. granted, 123 S. Ct. 1786 (2003); *infra* Part III.B.

<sup>146</sup> The court suggested “because such individual is older” and “on the basis of such individual’s advancing age” as alternatives to the neutral language of § 621 and § 631(a). *Hamilton*, 966 F.2d at 1228; see also *supra* notes 59, 140 (quoting §§ 621, 631).

<sup>147</sup> *Hamilton*, 966 F.2d at 1228.

<sup>148</sup> 296 F.3d 466 (6th Cir. 2002), cert. granted 123 S. Ct. 1786 (2003).

<sup>149</sup> *Id.* at 467. While the facts of *Cline* were clearly what courts traditionally considered a “reverse discrimination” challenge, the *Cline* court expressly rejected this terminology. *Id.* at 471. The court argued, “An action is either discriminatory or it is not discriminatory . . . . By the plain language of the ADEA [plaintiffs] are the victims of ‘age discrimination.’” *Id.*

against employees age forty to forty-nine.<sup>150</sup> Prior to CBA2, which went into effect July 1, 1997, the parties had operated under a collective bargaining agreement (“CBA1”) that provided full health benefits to retired employees with thirty years of seniority.<sup>151</sup> Under CBA2, General Dynamics no longer provided full health benefits to a retiree unless that person was fifty years old or older on July 1, 1997.<sup>152</sup>

The plaintiff-employees, who were all between the ages of forty and forty-nine on July 1, 1997, divided into three groups for the lawsuit.<sup>153</sup> The “Cline group” was comprised of current employees who were no longer eligible for retirement health benefits under CBA2.<sup>154</sup> The “Babb group” included ten employees who retired prior to July 1, 1997, in order to receive health benefits under CBA1.<sup>155</sup> The third group, the “Diaz group,” consisted of three employees who retired after July 1, 1997, thereby becoming ineligible for health benefits.<sup>156</sup> All groups alleged that providing health benefits solely to employees over age fifty was discrimination based on age.<sup>157</sup>

Characterizing the plaintiffs’ complaint as one of reverse discrimination, the district court dismissed the claims.<sup>158</sup> The court relied on *Hamilton*, as well as *Dittman v. General Motors Corp. – Delco Chassis Division*<sup>159</sup> and *Parker v. Wakelin*<sup>160</sup> for the proposition that reverse discrimination is not permitted by the ADEA.<sup>161</sup> In *Dittman*, a group of employees between ages forty and fifty challenged a retirement

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<sup>150</sup> *Id.* at 467-68. The plaintiffs also alleged that the health benefits provision violated the Ohio Civil Rights Act. *Id.* In addition to these discrimination claims, the plaintiffs asked the district court to “determine whether the Cline group had standing to sue and whether their claims were ripe.” *Id.* at 468.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* There were 183 members of this group. *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Cline v. Gen. Dynamics Land Sys., Inc.*, 98 F. Supp. 2d 846, 848 (N.D. Ohio 2000), *rev’d*, 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

<sup>159</sup> 941 F. Supp. 284 (D. Conn. 1996), *aff’d*, 116 F.3d 465 (2d Cir. 1997); *see also supra* note 105 (citing cases decided on grounds other than directly on whether the ADEA allows reverse discrimination).

<sup>160</sup> 882 F. Supp. 1131 (D. Me. 1995), *aff’d in part, rev’d in part on other grounds*, 123 F.3d 1 (1st Cir. 1997).

<sup>161</sup> *Cline*, 98 F. Supp. 2d at 848.

provision that was only available to employees over age fifty.<sup>162</sup> The district court based its holding on a conclusion that the retirement plan was a bona fide employee benefits program.<sup>163</sup> However, in dicta the court supported the *Hamilton* holding that the ADEA offers no remedy for reverse discrimination.<sup>164</sup> Likewise, a group of teachers between the ages of forty and fifty challenged a pension benefit system that favored teachers over age fifty in *Parker*.<sup>165</sup> The *Parker* court found that the plaintiffs lacked standing for a disparate impact challenge to a retirement system.<sup>166</sup> Like the *Dittman* and *Parker* courts, the *Cline* district court also approved of the Seventh Circuit's interpretation of congressional intent in *Hamilton*.<sup>167</sup> Ultimately, the district court concluded that while "CBA2 'facially discriminates' by creating two classes of employees based solely on age," the employees did not have a cause of action under the ADEA for reverse discrimination.<sup>168</sup>

The Sixth Circuit began its analysis of the district court's disposition by interpreting the language of § 631 and § 623 of the ADEA.<sup>169</sup> In order to ascertain Congress' intent in enacting the ADEA, the court applied the principles of statutory interpretation: (1) legislative intent is determined by the plain language of the statute; (2) if the statute is ambiguous, a court turns to the legislative history to determine Congress' intent; and (3) if the language provides a result that the court believes is inconsistent with what Congress "must have" intended, the court's reading must remain true to the language of the statute and may not attempt to correct the problem.<sup>170</sup> Turning to the language of the ADEA, the Sixth Circuit determined that the protection for individuals over age forty contained in § 631, when read together with the prohibition on discrimination

<sup>162</sup> 941 F. Supp. at 286.

<sup>163</sup> *Id.* at 286-87.

<sup>164</sup> *Id.* at 287.

<sup>165</sup> 882 F. Supp. at 1140-41.

<sup>166</sup> *Id.* at 1140. As in *Dittman*, the *Parker* court relied on *Hamilton* to support its holding. *Id.* at 1140-41.

<sup>167</sup> *Cline v. Gen. Dynamics Land Sys., Inc.*, 98 F. Supp. 2d 846, 848 (N.D. Ohio 2000), *rev'd*, 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003); see also *supra* notes 140-47 and accompanying text.

<sup>168</sup> *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 468 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

<sup>169</sup> *Id.* at 468-70. For the text of § 631(a), see *supra* note 140. For the text of § 623(a)(1)-(2), see *supra* note 47.

<sup>170</sup> *Cline*, 296 F.3d at 469. The court noted that the "'primary rule of statutory construction is to ascertain and give effect to the legislative intent.'" *Id.* (quoting *Hedgepeth v. Tennessee*, 215 F.3d 608, 616 (6th Cir. 2000)).

against “any individual” in § 623, plainly indicates that “an employer may not discriminate against *any* worker age forty or older on the basis of age.”<sup>171</sup>

After rejecting the *Hamilton* court’s interpretation of the appropriate ADEA plaintiff, the Sixth Circuit criticized *Hamilton* on four additional grounds.<sup>172</sup> First, the court rejected *Hamilton* and its progeny as relying too heavily on the generalized language of the Statement of Findings and Purpose in § 621.<sup>173</sup> Second, the court critiqued *Hamilton* on grounds that it reversed the traditional rule of statutory interpretation that “the more direct and specific language of a statute trumps the more generalized.”<sup>174</sup> The *Cline* court agreed that the general purpose of the ADEA was to protect “older workers,” but argued that protecting any worker above age forty was not inconsistent with this goal.<sup>175</sup> Furthermore, the *Cline* court found its interpretation to be consistent with that of the EEOC in regulation 1625.2 and criticized the *Hamilton* court’s failure to give the agency deference.<sup>176</sup> Finally, the court rejected the Seventh Circuit’s musings on what that court had considered the “overinclusive” nature of the statute’s language.<sup>177</sup> The *Cline* court noted, “If Congress wanted to

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<sup>171</sup> *Id.* (emphasis added). The Sixth Circuit then rejected the *Hamilton* interpretation of the appropriate ADEA plaintiff, which had been adopted by the district court. *Id.* at 470. The court observed that the *Hamilton* version would require the “any individual” language in § 623 to be interpreted as “older workers,” meaning only individuals who are both forty years old and relatively older than their replacement. *Id.* The court said, “We think the plain meaning of the statute will not bear that reading.” *Id.*

<sup>172</sup> *Id.* at 469-71.

<sup>173</sup> *Id.* at 470. For the full text of the statement of findings and purpose, see *supra* note 59 and accompanying text.

<sup>174</sup> *Cline*, 296 F.3d at 470.

<sup>175</sup> *Id.* The court also reframed the question presented in a protected class reverse discrimination context. *Id.* Rather than determining whether the ADEA prohibited discrimination against “older workers,” the Sixth Circuit posited that the question is really “whether any worker over the age of 40 (‘any individual’) may be discriminated against on the basis of age.” *Id.*

In a concurring opinion, Circuit Judge Cole observed that the Sixth Circuit’s reasoning, but not that of the *Hamilton* court, does not render § 623(l)(1)(A) meaningless. *Id.* at 473 (Cole, J., concurring). Judge Cole observed, “Section 623(l)(1)(A) allows an employer to set a minimum age as a condition for eligibility in a pension plan. If younger protected employees could not sue their employers for the preferable pension treatment of older employees, then the minimum age exception in [the section] would not be necessary . . . .” *Id.* (citation omitted).

<sup>176</sup> *Id.* at 471.

<sup>177</sup> *Id.* at 471-72.

limit the ADEA to protect only those workers who are relatively older, it clearly had the power and acuity to do so. It did not.”<sup>178</sup>

In a concurring opinion, Circuit Judge Cole noted that permitting reverse discrimination suits to go forward furthers two of the findings that support the ADEA.<sup>179</sup> First, Judge Cole argued that a fifty-year-old person is equally disadvantaged when discriminated against in favor of a younger person or in favor of an older person.<sup>180</sup> Second, Judge Cole claimed that reverse discrimination suits would reduce the burden on commerce created by unemployed older individuals.<sup>181</sup> As a final point, Judge Cole rejected the notion that reverse discrimination suits were absurd by noting that state discrimination laws are being interpreted to allow reverse discrimination suits.<sup>182</sup>

Judge Cole also reconciled the *O'Connor* “substantially younger” test with the *Cline* holding.<sup>183</sup> Judge Cole distinguished the facts in *O'Connor* from those at bar, noting that the *Cline* case was “a direct evidence age discrimination case,” so the prima facie test created by *O'Connor* did not directly apply.<sup>184</sup> Nevertheless, Judge Cole observed that the “substantially younger” test could have a significant impact on reverse discrimination claims because it suggests that the ADEA does not permit such claims.<sup>185</sup> Judge Cole refuted this implication by arguing that the Supreme Court was not considering a reverse discrimination case in *O'Connor*.<sup>186</sup> Secondly, the Supreme Court “acknowledged that members

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<sup>178</sup> *Id.* at 472.

<sup>179</sup> *Id.* at 474-75 (Cole, J., concurring).

<sup>180</sup> *Id.* “[A] fifty-year-old employee is equally disadvantaged in retaining and regaining employment if he is age discriminated against in favor of a thirty-year-old as if he is age discriminated against in favor of a sixty-year-old.” *Id.* at 474. This argument addressed the finding that “older workers find themselves disadvantaged in their efforts to retain employment” found in § 621(a)(1). *Id.*

<sup>181</sup> *Id.* at 474-75. “In another of its findings, Congress declared that ‘the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.’” *Id.* at 474.

<sup>182</sup> *Id.* “[C]ourts have already begun to interpret state discrimination laws as allowing reverse age discrimination suits . . . . Thus, based on the congressional statements of purpose and similar state-law provisions, it is not absurd to allow members of the protected class to sue for reverse discrimination.” *Id.* at 474-75.

<sup>183</sup> *Id.* at 475-76.

<sup>184</sup> *Id.* at 475.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* Cole also posited that “had the Supreme Court also considered the question of reverse age discrimination[,] I believe it would have expressed the fourth part of the prima facie test as requiring proof of ‘substantial difference in age’ as opposed to ‘substantially younger.’” *Id.*

within the protected class may sue one another.”<sup>187</sup> Third, the *Cline* court followed the same methodology that the Supreme Court used in *O’Connor* to determine whether the statutory language would allow a reverse age discrimination challenge.<sup>188</sup>

In sum, rather than follow the policy arguments of the Seventh Circuit in *Hamilton*,<sup>189</sup> the Sixth Circuit looked directly to the text of the ADEA to reach its decision that the ADEA provides a remedy to plaintiffs under a reverse discrimination theory.<sup>190</sup> In order to evaluate the merits of the Sixth and Seventh Circuit approaches, this Note next turns to an independent analysis of the Act.<sup>191</sup>

#### IV. THE ADEA PROTECTS MEMBERS OF THE PROTECTED CLASS FROM REVERSE DISCRIMINATION

The key question in the reverse discrimination debate is whether the ADEA only prohibits discrimination against those individuals over age forty who are also disfavored in relation to younger workers, as the *Hamilton* court suggests, or rather, as the *Cline* court posits, the Act unequivocally prohibits discrimination based on age against any individual over the age of forty.<sup>192</sup> When faced with such conflicting interpretations of a statute’s text, a court’s responsibility is to determine the legislature’s intent.<sup>193</sup> Tools of statutory interpretation, which direct the inquiry towards the statute’s language, structure, subject matter, context, and history, guide the court to a greater understanding of the statute’s meaning.<sup>194</sup> The value of these canons of interpretation can be debated.<sup>195</sup> In addition, their use, which is susceptible to the

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* Cole concluded, “[A]lthough a close call, I do not believe that our result violates Supreme Court precedent.” *Id.* at 476.

<sup>189</sup> See *supra* text accompanying notes 129-47.

<sup>190</sup> *Cline*, 296 F.3d at 467. Judge Williams dissented from the *Cline* majority, agreeing with the district court that *Hamilton* gave the appropriate interpretation of the ADEA. *Id.* at 476-77. He also expressed concern over the majority opinion’s impact on collective bargaining agreements. *Id.* at 476. He said, “The majority’s holding in this case potentially could [call] into question the validity of seniority and early retirement programs contained in collective bargaining agreements across the country. If such is allowed, bargaining for all workers, regardless of age, would suffer.” *Id.*

<sup>191</sup> See *infra* Part IV.

<sup>192</sup> See *supra* Part III.

<sup>193</sup> See *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998).

<sup>194</sup> *Id.*

<sup>195</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (“Canons of construction need not be conclusive and are often countered, of course, by some maxim

jurisprudential position of the judges, may change slightly over time as the court changes.<sup>196</sup> Nevertheless, these tools remain valuable as the primary means to unearth legislative intent.<sup>197</sup>

This Part applies contemporary federal court views of statutory interpretation to the sections of the ADEA critical to the reverse discrimination inquiry.<sup>198</sup> First, this Part looks to the statute itself, examining (1) the plain meaning of the language contained in § 621 (the statement of purpose), § 631 (limiting the protected class to those at least age forty), and § 623 (the prohibitive mandate);<sup>199</sup> (2) any contribution the Act's legislative history brings to the question;<sup>200</sup> and (3) the policy arguments for and against allowing reverse discrimination suits by members of the protected class.<sup>201</sup> Next, this Part considers whether regulation 1625.2(a) appropriately stands within the scope of the statute.<sup>202</sup> Finally, this Part concludes with a comparison of the forgoing analysis to the *Hamilton* and *Cline* court decisions.<sup>203</sup>

#### A. *The Statutory Language, History, and Policy*

##### 1. The Text

As the clearest indication of meaning, the text of the ADEA is the starting point for statutory analysis.<sup>204</sup> When the language of a statute is unambiguous, a court does not need to look beyond it to determine

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pointing in a different direction.”); *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

<sup>196</sup> See generally WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999). For example, the Supreme Court found that legislative history shows Congress did not intend a municipality to be a “person” for purposes of recovering damages under 42 U.S.C. § 1983 in *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961). However, the Court reversed itself on grounds that the same legislative history did support a finding that a municipality is a person in *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 690-91 (1978). For a criticism of traditional theories of statutory interpretation, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (exploring existing theories of interpretation and advocating a new “practical reasoning” approach).

<sup>197</sup> *Chickasaw Nation*, 534 U.S. at 94.

<sup>198</sup> See *infra* Part IV.A.

<sup>199</sup> See *infra* Part IV.A.1.

<sup>200</sup> See *infra* Part IV.A.2.

<sup>201</sup> See *infra* Part IV.A.3.

<sup>202</sup> See *infra* Part IV.B.

<sup>203</sup> See *infra* Part IV.C.

<sup>204</sup> See *Muscarello v. United States*, 524 U.S. 125, 127-28 (1998) (“We begin with the statute’s language.”).

legislative intent.<sup>205</sup> However, if two people could reasonably interpret the statutory language to mean different things, the language is ambiguous and the inquiry must continue into other textual aids.<sup>206</sup> Furthermore, in determining whether a statute is ambiguous, the Supreme Court looks to the entire statute as a whole.<sup>207</sup> This “whole act” approach incorporates the entire statutory text but does not prevent a court from finding that some portions of the text have more authority to override implications from other portions in question.<sup>208</sup>

Applying these principles to the text of the ADEA reveals that the Act contains no significant ambiguity.<sup>209</sup> First, the prohibitive mandate of § 623 is not by itself ambiguous.<sup>210</sup> This section clearly makes it unlawful for any employer to discriminate against “any individual . . . because of such individual’s age.”<sup>211</sup> The plain meaning of the word “individual” rejects any suggestion that the term is defined by relationship to another individual, such as a younger or older person or thing.<sup>212</sup> According to *Webster’s Third Dictionary*, an individual is “a single or particular being or thing or group of beings or things.”<sup>213</sup> Section 623 contains no reference to older workers, older persons, or any other language that would indicate a congressional intent to modify this definition.<sup>214</sup> Furthermore, this section is not ambiguous when read in conjunction with § 631, which establishes the Act’s protected group.<sup>215</sup> Section 631 defines the “age limits” of the Act as confined to

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<sup>205</sup> *United States v. Wells*, 519 U.S. 482, 497 (1997) (“Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.”) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

<sup>206</sup> 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46.04, at 145-46 (6th ed., rev. vol. 2000).

<sup>207</sup> *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). “A court must . . . interpret the statute ‘as a symmetrical and coherent regulatory scheme’ and ‘fit, if possible, all parts into an harmonious whole.’” *Id.* (citation omitted).

<sup>208</sup> *See* 2A SINGER, *supra* note 206, § 47.02, at 212.

<sup>209</sup> *See infra* text accompanying notes 210-24.

<sup>210</sup> *See infra* notes 211-17 and accompanying text. For the text of § 623(a)(1)-(2), *see supra* note 47.

<sup>211</sup> 29 U.S.C. § 623 (2000).

<sup>212</sup> *See infra* text accompanying note 213. When construing statutory language, a court should interpret words according to their ordinary meaning. *Crane v. Comm’r of Internal Revenue*, 331 U.S. 1, 6 (1947) (“[T]he words of statutes . . . should be interpreted where possible in their ordinary, everyday senses.”).

<sup>213</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1152 (3d ed. 1966).

<sup>214</sup> *See* 29 U.S.C. § 623. The Act’s definition of “employee” also refers to “individuals.” *Id.* § 630(f) (“The term ‘employee’ means an individual employed by any employer . . .”).

<sup>215</sup> *See id.* §§ 623, 631; *see also supra* text accompanying note 171.



“[i]ndividuals at least 40 years of age.”<sup>216</sup> Consistent with § 631 and § 623, no other section in the Act’s body refers to the workers protected by the ADEA with terminology alternative to “individuals.”<sup>217</sup>

The references to “older workers” and “older persons” in the ADEA Statement of Findings and Purpose, § 621, do not create ambiguity as against the remainder of the statutory text.<sup>218</sup> The federal courts have consistently held that the language of an act’s preamble<sup>219</sup> is not dominant to, or even equal with, the language in the body of the act.<sup>220</sup> Rather, a court may resort to using the preamble as an interpretive guide only when the language of the statute has first proved ambiguous.<sup>221</sup> Because the mandate to protect any individual over the age of forty is clear in the text of the ADEA, a court need not look to the Act’s preamble for guidance.<sup>222</sup> In addition, using the text of the Statement of Findings and Purpose to create ambiguity would violate the principle that statutory interpretation may not be used to create ambiguity where none otherwise exists.<sup>223</sup> Finally, even if a court weighs § 621’s promotion of

<sup>216</sup> 29 U.S.C. § 631(a).

<sup>217</sup> See *id.* §§ 621–634.

<sup>218</sup> See *infra* notes 219–24 and accompanying text.

<sup>219</sup> The Statement of Findings and Purpose in § 621 of the ADEA falls well within the dictionary definition of a preamble: “the introductory part of a statute . . . that states the reasons and intent of the law . . . or is used for other explanatory purposes . . . .” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1783 (3d ed. 1966).

<sup>220</sup> See, e.g., *Coosaw Mining Co. v. South Carolina ex. rel. Tillman*, 144 U.S. 550, 563 (1892) (“[E]xpress provisions in the body of an act cannot be controlled or restrained by the title or preamble.”); *Samuels v. District of Columbia*, 650 F. Supp. 482, 484 (D.D.C. 1986) (“[T]he preamble of the Housing Act is merely a general statement of policy which does not mitigate and certainly does not override the specific requirements laid out in the body of the statute.”) (criticizing defendant’s reliance on the preamble of the Fair Housing Act to avoid liability).

<sup>221</sup> *Price v. Forrest*, 173 U.S. 410, 427 (1899); *Beard v. Rowan*, 34 U.S. 301, 317 (1835) (“The preamble in the act may be resorted to, to aid in the construction of the enacting clause, when any ambiguity exists.”). According to the *Price* court:

Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions.

173 U.S. at 427.

<sup>222</sup> See *supra* text accompanying notes 209–17.

<sup>223</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (“[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate

opportunities for “older workers” against the “any individual” language contained in the rest of the statute, the prohibition of discrimination against “any individual” must prevail under the principle that the specific language trumps the more general language.<sup>224</sup>

The principal that no section of the ADEA should be rendered superfluous by means of statutory interpretation further supports what the clear language of the statute indicates: that an ADEA plaintiff only needs to be over the age of forty.<sup>225</sup> Section 623(l)(1)(A) of the statute allows an employer to set a minimum age for eligibility of retirement benefits in connection with a pension plan.<sup>226</sup> If the legislature did not contemplate the possibility of a younger member of the protected class suing an employer because the employer treated older members more favorably, this section would be unnecessary—the statute would not need to contain a provision protecting employers from such suits.<sup>227</sup>

Furthermore, Congress chose to use a scalpel, rather than an axe, when it carved this age exemption, as well as the broader benefits and seniority system exemptions found in § 623(f), in the 1990 Older Workers Benefit Protection Act (“OWBPA”) amendments to the ADEA.<sup>228</sup>

ambiguity. It demonstrates breadth.”) (citing *Penn. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)); *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923) (“Rules of statutory construction . . . have no place . . . except in the domain of ambiguity. They may not be used to create but only to remove doubt.”) (citations omitted).

<sup>224</sup> *Townsend v. Little*, 109 U.S. 504, 512 (1883); see also 3A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 74.09, at 395 (5th ed. 1992) (“When . . . two different parts of the same statute appear to conflict, the court should first examine the language to determine whether they may be reconciled.”).

<sup>225</sup> *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 877 (1991) (“Our cases consistently have expressed ‘a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.’”) (quoting *Penn. Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990)); see also *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 473 (6th Cir. 2002) (Cole, J., concurring), *cert. granted*, 123 S. Ct. 1786 (2003). For the text of Circuit Judge Cole’s concurrence on this issue in *Cline*, see *supra* note 175.

<sup>226</sup> Section 623 provides:

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) solely because—

(A) an employee pension benefit plan . . . provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits . . . .

29 U.S.C. § 623(l)(1)(A) (2000).

<sup>227</sup> See *Cline*, 296 F.3d at 473.

<sup>228</sup> See *supra* note 51.

OWBPA was enacted after the decisions in *Karlen* and *Schuler*, the principal cases on which the *Hamilton* court relied to conclude that the ADEA barred reverse discrimination claims.<sup>229</sup> The plaintiffs' challenges in both cases, an early retirement plan in *Karlen* and a voluntary severance option in *Schuler*, were addressed in the OWBPA amendments.<sup>230</sup> Had Congress chosen at that time to bar *all* ADEA challenges by younger members of the protected class, it could have done so.<sup>231</sup> Instead, Congress enacted several explicit exceptions to the overall ban on age discrimination against employees over the age of forty.<sup>232</sup> Any attempt to add to these explicit exceptions would abrogate Congress' intent to prevent age discrimination in its many unique forms.<sup>233</sup>

In sum, Congress' intent to prohibit discrimination against any individual over the age of forty is clear from the plain meaning of the Act's text.<sup>234</sup> Allowing the generalized call to provide opportunities for "older workers" found in the Statement of Findings and Purpose to limit or muddy the statute's clear mandate would violate settled principles of statutory interpretation, including the Supreme Court's instruction that an act's preamble may only be used as a second source of guidance when a statutory text is otherwise ambiguous.<sup>235</sup> Furthermore, reading the statute to prohibit reverse discrimination claims by members of the protected class would inappropriately render the pension benefit exception in § 623(l)(1)(A) irrelevant.<sup>236</sup> Finally, following *Karlen* and *Schuler*, Congress was on notice that younger members of the protected class may use the ADEA to challenge employer programs that benefit

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<sup>229</sup> See *supra* notes 129-36 and accompanying text.

<sup>230</sup> See Older Workers Benefit Prot. Act, Pub. L. No. 101-433, 104 Stat. 978 (1990). In the Senate Report accompanying OWBPA, Congress approved of the *Karlen* holding. See S. REP. NO. 101-263, at 12, 14-15 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1517, 1519-20 (stating that the *Karlen* court appropriately concluded that a reduction in early retirement benefits must be closely correlated with cost and not based on age alone).

<sup>231</sup> See *Cline*, 296 F.3d at 471-72. The Senate Report of OWBPA emphasized the broad sweep of the ADEA and the very narrow circumstances in which the abridgment of its prohibition on age discrimination is appropriate. See S. REP. NO. 101-263, at 5-6, reprinted in 1990 U.S.C.C.A.N. 1510-11.

<sup>232</sup> See 104 Stat. 978; *supra* note 231.

<sup>233</sup> See *supra* notes 59-60 and accompanying text; see also *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others.").

<sup>234</sup> See *supra* notes 204-33 and accompanying text.

<sup>235</sup> See *supra* notes 209-24 and accompanying text.

<sup>236</sup> See *supra* notes 225-27 and accompanying text.

older members.<sup>237</sup> Rather than restrict all access to the courts by these plaintiffs, Congress chose to establish exceptions to protect employers in specific situations.<sup>238</sup> In so acting, Congress deliberately preserved the ADEA's general protection for all employees over the age of forty.<sup>239</sup>

## 2. Legislative History

Although a court need not resort to the legislative history of a statute when the text itself is clear, legislative history can provide insight into the legislature's intended goals.<sup>240</sup> Legislative history is usually decisive of the issue when it is available and supports the apparent meaning of the text.<sup>241</sup> However, a statute's legislative history will *not* be decisive when it is contradictory to the plain meaning of the statutory language.<sup>242</sup> Despite the second-tier value of such history (as compared to the statutory text), it can aid a court in determining how the legislature would have responded "had it possessed the foresight to anticipate what has happened since the statute's enactment."<sup>243</sup>

At the very least, the legislative history of the ADEA provides little insight into reverse discrimination challenges brought by older members of the protected class.<sup>244</sup> At the most, the history is expansive enough to tolerate such claims.<sup>245</sup> The House Report that accompanied the ADEA speaks generally of a need to promote hiring free from age discrimination<sup>246</sup> and reiterates the purpose of the Act as promoting "the employment of older workers based on their ability" and prohibiting

<sup>237</sup> See *supra* notes 228-31 and accompanying text.

<sup>238</sup> See *supra* note 232 and accompanying text.

<sup>239</sup> See *supra* text accompanying notes 237-38.

<sup>240</sup> See 2A SINGER, *supra* note 206, § 45.02, at 15-16; see also Eskridge & Frickey, *supra* note 196, at 357 (noting that legislative history has a "second-best status . . . as an interpretive guide").

<sup>241</sup> See Eskridge and Frickey, *supra* note 196, at 356-57.

<sup>242</sup> *Id.* at 357. As Eskridge and Frickey explain:

Unlike the statutory text, it was not enacted into law, and giving conclusive effect to clear legislative history when statutory language is ambiguous or vague is in tension with Article I requirements. It also may threaten to promote rent-seeking by private interests . . . . Thus, even crystal-clear legislative history will not always control interpretation, and in any event other interpretive sources will be considered.

*Id.*

<sup>243</sup> *Id.*

<sup>244</sup> See *infra* text accompanying notes 245-50.

<sup>245</sup> See *infra* text accompanying notes 246-50.

<sup>246</sup> See *supra* note 60.

arbitrary age discrimination.<sup>247</sup> Both this report and the legislative reports for the Act's later amendments raising the upper age limit of the protected class focused on eliminating forced retirement of older employees.<sup>248</sup> The expansive language of these reports, and their focus on mandatory retirement, suggest that the legislature was primarily concerned with the broad sweep of discrimination against older workers, rather than the nuances of how violations may occur.<sup>249</sup> In fact, Congress recognized that the variety of situations in which the ADEA may apply necessitates a case-by-case approach to administration of the Act.<sup>250</sup>

Secretary Wirtz's report to Congress also speaks in broad terms, although its language suggests a prioritization of the ADEA's aims.<sup>251</sup> His report proposes four actions for the legislature, beginning first with ending arbitrary discrimination, followed by adjusting existing discriminatory employment systems and creating new employment and educational opportunities for older workers.<sup>252</sup> These statements only confirm the breadth of legislative action taken by Congress in enacting the ADEA and provide little commentary on reverse discrimination.<sup>253</sup>

The most direct legislative statement applicable to the question of reverse discrimination is that of Senator Javitz, a sponsor of the ADEA.<sup>254</sup> Javitz postulated that, "if two individuals ages 52 and 42 apply for the same job and the employer selected the man age 42 . . . because he is younger than the man age 52, then he will have violated the act."<sup>255</sup> Statements of an act's sponsor are entitled to some deference when the statement is consistent with the language and legislative history of the act, although they are not binding.<sup>256</sup> However, isolated statements contained in the legislative history are accorded very little weight,

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<sup>247</sup> See H.R. REP. NO. 805, at 1 (1967), reprinted in 1967 U.S.C.C.A.N. 2213, 2214; *supra* note 59 and accompanying text; see also S. REP. NO. 101-263, at 8 (1990) reprinted in 1990 U.S.C.C.A.N. 1513 (describing these aims as the "two critical purposes" behind the ADEA).

<sup>248</sup> See *supra* notes 43-45 and accompanying text.

<sup>249</sup> See *supra* notes 59-61 and accompanying text.

<sup>250</sup> See *supra* text accompanying note 60.

<sup>251</sup> See *infra* text accompanying notes 252-53.

<sup>252</sup> See *supra* note 35 and accompanying text (listing Secretary Wirtz's recommended actions).

<sup>253</sup> See *supra* notes 35-39 and accompanying text.

<sup>254</sup> See *infra* text accompanying notes 255-58.

<sup>255</sup> Stephen E. Gruendel, *Rejecting the Requirement that ADEA Plaintiffs Demonstrate Replacement from Outside Protected Class: O'Connor v. Consolidated Coin Caterers Corp.*, 38 B.C. L. REV. 381, 390 (1997).

<sup>256</sup> See 2A SINGER, *supra* note 206, § 48.15, at 475-77.

particularly as against the overall language of the statute.<sup>257</sup> In any case, regardless of the probative value of Senator Javitz's hypothetical, his statement does not indicate whether preference of the fifty-two-year-old because of his age would also violate the Act.<sup>258</sup>

Overall, the legislative history of the ADEA indicates that Congress did not anticipate every peculiarity that might crop up under the Act.<sup>259</sup> Rather, Congress intended the ADEA to function as a broad prohibition on age discrimination in the workplace, with certain narrowly tailored exceptions.<sup>260</sup> While this broad aim accommodates claims of reverse discrimination brought by members of the protected class, it provides no directive on the issue.<sup>261</sup> For further guidance, this Note next considers the policy arguments on both sides of the reverse discrimination debate.<sup>262</sup>

### 3. Policy Considerations

In the context of civil rights legislation, courts will liberally construe a statute's language so that its remedial objectives can be realized to their fullest potential.<sup>263</sup> Under this inclusive approach, the prohibitions of civil rights legislation extend beyond the primary evil targeted by a statute to reach reasonably comparable evils.<sup>264</sup> In this manner, a court is

<sup>257</sup> See *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 581-82 (1994); *Garcia v. United States*, 469 U.S. 70, 78 (1984).

<sup>258</sup> Cf. text accompanying note 67 (quoting the text of regulation 1625.2(a)). This question is more directly addressed by EEOC regulation 1625.2(a), discussed *infra* Part IV.B.

<sup>259</sup> See *supra* text accompanying notes 244-58.

<sup>260</sup> See *supra* notes 50-52 and accompanying text; see also *supra* Part IV.A.I.

<sup>261</sup> See *supra* text accompanying notes 244-58.

<sup>262</sup> See *infra* Part IV.A.3; see also 2A SINGER, *supra* note 206, § 45:09, at 49. "Considerations of what purpose legislation is supposed to accomplish are often mentioned as grounds for the interpretation given to a statute." *Id.*

<sup>263</sup> See 3A SINGER, *supra* note 224, § 74.05, at 374. "[C]ourts favor broad and inclusive application of statutory language by which the coverage of legislation to protect and implement civil rights is defined." *Id.*; see *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (liberally interpreting the Title VII prohibition against sex discrimination to same-sex sexual harassment); H.R. REP. NO. 805, at 1-2 (1967), reprinted in 1967 U.S.C.C.A.N. 2213, 2214 (describing the remedial purpose of the Act).

<sup>264</sup> *Oncale*, 523 U.S. at 79-80. In *Oncale*, a male employee was repeatedly harassed by his male supervisors. *Id.* at 77. The Supreme Court held that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . . Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements." *Id.* at 79-80 (emphasis added).

able to apply the corrective spirit of the legislation within a changing social context.<sup>265</sup>

Under the ADEA specifically, allowing reverse discrimination claims brought by younger members of the protected class is the only way in which to completely effectuate both remedial purposes of the Act.<sup>266</sup> If the Act's purpose of promoting the employment of older workers dominates its purpose of eliminating arbitrary age discrimination, the latter cannot fully be realized.<sup>267</sup> For example, employee A is four years younger than employee B, and both are over the age of forty.<sup>268</sup> A and B are hired at the same time and so have equal seniority under their employer's collective bargaining agreement ("CBA").<sup>269</sup> Their employer then adds a tie-breaker provision to the CBA, which bases seniority benefits on "earliest date of birth."<sup>270</sup> Subsequently, A loses her job to B, who was able to take the preferred position solely because B is older.<sup>271</sup> In this situation, if the ADEA only protects the older of A and B, then A cannot challenge the tie-breaking provision, and arbitrary discrimination based solely on age has occurred against a member of the class specifically protected from such discrimination by the Act.<sup>272</sup>

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<sup>265</sup> See 2A SINGER, *supra* note 206, § 45:09, at 52. "[T]he words of a statute should be regarded as embodying a delegation of authority to exercise responsible creative judgment in relating the statutory concept, spirit, purpose, or policy to changing needs of society." *Id.*

<sup>266</sup> See *infra* text accompanying notes 267-74.

<sup>267</sup> See *infra* notes 268-72 and accompanying text.

<sup>268</sup> This example follows the fact pattern of *Garrett*, 1997 WL 574739 (E.E.O.C. Sept. 5, 1997), *aff'd*, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999).

<sup>269</sup> *Garrett*, 1997 WL 574739, at \*1.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> In *Garrett*, the plaintiff filed an equal opportunity complaint with her employer, the postal service. *Id.* at \*1-2. The postal service's administrative judge concluded that the CBA violated the ADEA when it used age as a tie-breaker, but the postal service rejected these findings and concluded that no discrimination had occurred. *Id.* In reversing the postal service, the EEOC administrative judge concluded that regulation 1625.2 applied directly to this situation, and that the Commission's interpretation of the ADEA was entitled to greater deference than the opinions of the Seventh Circuit in *Hamilton*. *Id.* When the Union appealed out of concern that abrogation of the CBA provision would disrupt employee assignments and working conditions nationwide, a subsequent EEOC administrative judge concluded, "[W]e do not find that a violation of the ADEA should be allowed to continue merely because of speculation that an adverse ruling could result in a disruption of the assignments of [Rural Carrier Associates] and impact mail service in the United States." 1999 WL 909980, at \*3 (E.E.O.C. Sept. 30, 1999).

Statutory interpretation must suppress the illegal activity, including subtle inventions and evasions that enable the illegal activity to continue, and advance the remedy of the statute.<sup>273</sup> If the ADEA is intended to promote employment opportunities for all individuals aged at least forty years, then the prohibition on arbitrary age discrimination serves to seal the gaps left open by traditional age discrimination claims brought by individuals passed over for their younger counterparts—even those claims unanticipated by the legislature when enacting the ADEA.<sup>274</sup>

Although public policy strongly weighs in support of protected-class reverse discrimination suits, several arguments have been advanced against allowing these claims.<sup>275</sup> The primary argument in the federal courts is that the ADEA was never intended to advantage younger individuals to the detriment of their older counterparts, regardless of the younger person's age.<sup>276</sup> Allowing these claims would lead to results so bizarre that the aim of the ADEA, to protect older employees, would be severely thwarted.<sup>277</sup> Several courts have opined that the ADEA does not require that all members of the protected class be treated equally.<sup>278</sup> The preamble of the Act also lends support to considering the relative ages of the disadvantaged and replacement employees in ADEA complaints by stating that "the incidence of unemployment . . . is, relative to the younger ages, high among older workers."<sup>279</sup> This argument gains some force from the Supreme Court's *O'Connor* decision, which concluded that in order to establish a prima facie case of age discrimination, an ADEA plaintiff in a discriminatory treatment case does not need to show replacement by someone outside the protected class, but merely by someone "substantially younger."<sup>280</sup> In addition to

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<sup>273</sup> See 1A SINGER, SUTHERLAND ON STATUTES AND STATUTORY INTERPRETATION § 31.6, at 727 (6th ed., rev. vol. 2002).

<sup>274</sup> See *supra* note 264 and accompanying text.

<sup>275</sup> See *infra* text accompanying notes 276-83.

<sup>276</sup> See, e.g., *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 476-77 (6th Cir. 2002) (Williams, J., dissenting), *cert. granted*, 123 S. Ct. 1786 (2003); *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1227 (7th Cir. 1992); see also *supra* note 103 and accompanying text.

<sup>277</sup> See *Cline*, 296 F.3d 466, 476-77 (Williams, J., dissenting); *Hamilton*, 966 F.2d at 1227; see also *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 594-95 (1995) (Thomas, J., dissenting) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994)). "[P]olicy considerations 'cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result "so bizarre" that Congress could not have intended it.'" *Id.*

<sup>278</sup> See *supra* notes 129-39 and accompanying text; see also *supra* note 104.

<sup>279</sup> 29 U.S.C. § 621(a)(3) (2000). For a statement of the findings, see *supra* note 59.

<sup>280</sup> See *supra* notes 87-92 and accompanying text.



this policy argument, courts confronted with reverse discrimination claims have also been concerned with their impact on CBAs.<sup>281</sup> If the ADEA can be used to invalidate seniority and early retirement provisions in CBAs, freedom to contract could be hampered to the detriment of all employees, regardless of age.<sup>282</sup> Many federal courts have rejected reverse discrimination suits on the basis of these two broad conclusions.<sup>283</sup>

Yet despite their popularity, the arguments against allowing protected-class reverse discrimination claims are not convincing.<sup>284</sup> First, the CBA argument fails under the elementary contract law principle that one cannot contract for that which is illegal.<sup>285</sup> As contracts between employers and the unions representing the employees, CBAs cannot contain age-based provisions that overreach the scope of permissible activity under the ADEA.<sup>286</sup> The conclusion that the ADEA only protects plaintiffs relatively older than their replacement requires greater discussion.<sup>287</sup>

The opponents of reverse discrimination claims overstate their detrimental impact on the employees who are older than the reverse discrimination plaintiffs.<sup>288</sup> The ADEA already protects age-based decisions in bona fide seniority systems and employee benefits plans and specifically allows for employers to use age as a proxy for pension benefits.<sup>289</sup> In addition, OWBPA, which created these exceptions, explicitly states that the ADEA was intended to bar *all* age-based

<sup>281</sup> See, e.g., *Cline*, 296 F.3d at 476-77 (Williams, J., dissenting); *Garrett*, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999).

<sup>282</sup> See *Cline*, 296 F.3d at 476-77 (Williams, J., dissenting).

<sup>283</sup> See *supra* notes 104-06 and accompanying text.

<sup>284</sup> See *infra* text accompanying notes 285-97.

<sup>285</sup> See *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253, 256 (9th Cir. 1965). "It is . . . ordinarily desirable that competent parties be protected in their rights to make and enforce agreements between themselves. These rights are restricted by the transcendent rule that denies enforceability to a private contractual provision which would require an unlawful act. . . ." *Id.*

<sup>286</sup> See *Garrett*, 1997 WL 574739 (E.E.O.C. Sept. 5, 1997), *aff'd*, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999). Cf. *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 904 (1989) (finding that female employees did state a claim for relief when they alleged that a CBA provision was discriminatory based on sex in violation of Title VII, but that their claim was time-barred), *superseded by statute on other grounds*, *Casteel v. Executive Bd. of Local 703 of the Int'l Bhd. of Teamsters*, 272 F.3d 463, 466 (7th Cir. 2001).

<sup>287</sup> See *infra* text accompanying notes 288-97.

<sup>288</sup> See *infra* text accompanying notes 289-91.

<sup>289</sup> See *supra* notes 50-51 and accompanying text.

discrimination in *all* employee benefits except when reductions are justified by significant cost considerations.<sup>290</sup> With OWBPA, Congress made it clear that the ADEA does allow an employer to treat one group within the protected class more favorably than another group, but only when the distinction is not arbitrarily based on age alone.<sup>291</sup>

Furthermore, the *O'Connor* decision does not foreclose reverse discrimination claims.<sup>292</sup> In *O'Connor*, the Supreme Court emphasized that proper analysis of an ADEA claim does not hinge on the relative age differences between the advantaged and disadvantaged employees.<sup>293</sup> Rather, the critical inquiry is whether the disadvantaged employee lost out *because of his or her age*.<sup>294</sup> Turning to the specific facts of the case, which involved the plaintiff's replacement by a younger person, the Court concluded that replacement by a substantially younger person was more probative evidence of discrimination than replacement by someone outside the protected class or someone insignificantly younger.<sup>295</sup> Under the Court's "because of age" test, the "substantially younger" requirement does not prohibit younger plaintiffs from fighting arbitrary age discrimination that advantages older individuals.<sup>296</sup> Rather, it resolves a disagreement in the lower federal courts over whether a traditional (older) plaintiff's replacement must be outside the protected class, and it provides a guideline for establishing a *prima facie* case in those situations.<sup>297</sup>

In conclusion, the ADEA is part of a body of civil rights legislation that courts have consistently interpreted in a liberal manner in order to fully actualize the legislature's remedial goals.<sup>298</sup> Excluding reverse discrimination claims substantially impedes the twin purposes of the Act—the prevention of arbitrary age discrimination and the promotion

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<sup>290</sup> See Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 101, 104 Stat. 978, at 978 (1990). As a practical matter, the exception that allows for a reduction in benefits based on cost considerations disfavors older members of the protected class and favors the younger. See 29 U.S.C. § 623 (2000). Conversely, younger members are disfavored by the ADEA's approval of setting an eligibility age for pension benefits. See *id.* § 623(l)(1)(A).

<sup>291</sup> See *supra* notes 50-52 and accompanying text.

<sup>292</sup> See *infra* text accompanying notes 293-97.

<sup>293</sup> See *supra* notes 87-90 and accompanying text.

<sup>294</sup> See *supra* text accompanying note 89.

<sup>295</sup> See *supra* text accompanying notes 91-92.

<sup>296</sup> See *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 474-76 (6th Cir. 2002) (Cole, J., concurring), *cert. granted*, 123 S. Ct. 1786 (2003).

<sup>297</sup> See *supra* notes 81, 90 and accompanying text.

<sup>298</sup> See *supra* notes 263-65 and accompanying text.

of employment opportunities for older workers.<sup>299</sup> Because parties to a contract cannot make illegal contracts, age-based provisions in CBAs that are not excepted by the Act's seniority or benefits provisions can receive no legal protection.<sup>300</sup> Finally, the *O'Connor* decision not only does not foreclose, but lends support to, the permissibility of reverse discrimination claims by focusing on whether the plaintiff was disadvantaged because of age.<sup>301</sup> Having weighed these policy considerations and having explored the legislative history of the ADEA and the text of the statute itself, this Note next questions whether regulation 1625.2(a) is consistent with the Act.<sup>302</sup>

B. *Regulation 1625.2(a)*

When an agency regulation purports to interpret an act's provisions, statutory interpretation does not end with the language of the act.<sup>303</sup> Rather, a court must also determine whether the regulation complies with the statute.<sup>304</sup> Administrative interpretations are usually given great deference, particularly in the innovative forum of civil rights legislation.<sup>305</sup> However, an agency's understanding of a statute will not be entitled to deference if it exceeds the meaning that the statute can bear.<sup>306</sup> The Supreme Court articulated a test to determine whether a regulation goes beyond the scope of its statute in *Chevron, U.S.A., Inc. v. NRDC, Inc.*<sup>307</sup> First, a court asks "whether Congress has directly spoken to the precise question at issue."<sup>308</sup> If Congress has not explicitly addressed the issue, the court must next ask whether the administrative interpretation is reasonable.<sup>309</sup> Under this two-step analysis, EEOC

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<sup>299</sup> See *supra* notes 266-74 and accompanying text. As this Note argues, "older workers" means all workers forty and older, rather than older in a comparative sense. See *supra* Parts II.B, IV.A.1.

<sup>300</sup> See *supra* notes 281-91 and accompanying text.

<sup>301</sup> See *supra* text accompanying notes 292-97.

<sup>302</sup> See *infra* Part IV.B.

<sup>303</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-48 (1984); see also 1A SINGER, *supra* note 273, § 31.6, at 726.

<sup>304</sup> See *Chevron*, 467 U.S. at 842-45.

<sup>305</sup> See 3A SINGER, *supra* note 224, § 74.09, at 396.

<sup>306</sup> *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994).

<sup>307</sup> 467 U.S. 837 (1984).

<sup>308</sup> *Id.* at 842. If Congressional intent is clear by the unambiguous language of the statute, then the second prong of the test need not be reached. *Id.* at 842-43.

<sup>309</sup> *Id.* at 843-44. In determining reasonableness, a court may not impose its own interpretation on the statute. *Id.* at 843. In addition, the court need not conclude that the agency's interpretation is the only permissible one, or even the one that the court would have reached. *Id.* at 843 n.11.

regulation 1625.2(a), which requires an employer to make employment decisions based on some factor other than age, clearly falls within the ADEA statutory prohibition against discrimination.<sup>310</sup>

The purview of the ADEA unambiguously states that age discrimination against any individual over the age of forty is unlawful.<sup>311</sup> Under this broad mandate of protection, Congress impliedly addressed the precise question of, and endorsed the viability of, protected class reverse discrimination claims by making age forty the sole criterion for individuals to be protected by the Act.<sup>312</sup> Regulation 1625.2(a) states this implied authorization in more explicit terms by saying, "It is unlawful . . . for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over."<sup>313</sup> The regulation's ban on age-based distinctions *between* individuals is not contrary to the Act's protection of *any* individual, but rather emphasizes that the ADEA inquiry turns on the discriminatory motive of the employer rather than on the court's opinion of the hardship caused by disfavoring a particular plaintiff employee.<sup>314</sup> Read in this manner, the regulation merely illustrates the prohibitions of the Act.<sup>315</sup>

Even assuming that the references to "older workers" and "older individuals" in the preamble of the ADEA create ambiguity against the "any individual" language of the Act's body, regulation 1625.2(a) is still a reasonable interpretation of the statute.<sup>316</sup> A regulation is unreasonable only when it is contrary to the statutory language or the policy choices

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<sup>310</sup> See *infra* text accompanying notes 311-24. Regulation 1625.2 reads in part:

It is unlawful . . . for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

29 C.F.R. § 1625.2(a) (2002).

<sup>311</sup> See *generally supra* Part IV.A.1.

<sup>312</sup> See *generally supra* Part IV.A. According to the *Chevron* court, when legislative delegation to an agency to interpret the breadth of a statute is implied, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. at 844.

<sup>313</sup> 29 C.F.R. § 1625.2(a).

<sup>314</sup> See *generally supra* Part IV.A.

<sup>315</sup> See *generally supra* Part IV.A.; *supra* text accompanying notes 310-14.

<sup>316</sup> See *infra* text accompanying notes 317-24. For a discussion of whether the preamble and purview of the statute create ambiguity when read together, see *supra* text accompanying notes 218-24.

indicated by the Act's legislative history.<sup>317</sup> As explained above, the language of regulation 1625.2(a) does not run in opposition to the language of the ADEA.<sup>318</sup> The ADEA legislative history also does not clearly reject the EEOC's interpretation of the Act.<sup>319</sup> While several courts have argued that Congress intended only to benefit employees who were disfavored against relatively younger employees, neither the legislative history nor the language of the statute suggest that this preference continues into the protected class.<sup>320</sup> Rather, both indicate that Congress intended to reduce arbitrary discrimination against older workers.<sup>321</sup> Regulation 1625.2(a) effectuates this policy by making clear that an age-based decision disfavoring any member of the protected class is unlawful.<sup>322</sup> Consequently, the regulation satisfies both prongs of the *Chevron* analysis.<sup>323</sup> This Note next applies the principles explored in Part IV to the Sixth and Seventh Circuit split over reverse discrimination.<sup>324</sup>

### C. Analysis of the Circuit Split

This section evaluates the merits of the Sixth and Seventh Circuits' analyses of reverse discrimination under the ADEA.<sup>325</sup> First, this section critiques the Seventh Circuit's policy-oriented analysis in *Hamilton* as a product of faulty reasoning.<sup>326</sup> Next, this section considers the statutory construction arguments of the *Cline* court and concludes that the Sixth Circuit in *Cline* provides the stronger evaluation of protected-class reverse discrimination under the Act.<sup>327</sup>

#### 1. Seventh Circuit

In *Hamilton*, the Seventh Circuit reached the correct result, denying the plaintiffs recovery, albeit via incorrect reasoning.<sup>328</sup> The early

<sup>317</sup> *Chevron*, 467 U.S. at 845; see also 1A SINGER, *supra* note 273, § 31.6, at 728-30; 3A SINGER, *supra* note 224, § 74.09, at 396 (an administrative interpretation is usually given deference, unless it is inconsistent with mandate of statute or would undermine policies of statute).

<sup>318</sup> See *supra* text accompanying notes 303-15.

<sup>319</sup> See *supra* Part IV.A.2.

<sup>320</sup> See *supra* Part IV.A.1-2.

<sup>321</sup> See *supra* Part IV.A.1-2.

<sup>322</sup> See *supra* text accompanying note 286.

<sup>323</sup> See *supra* text accompanying notes 303-22.

<sup>324</sup> See *infra* Part IV.C.

<sup>325</sup> See *infra* text accompanying notes 326-27.

<sup>326</sup> See *infra* Part IV.C.1.

<sup>327</sup> See *infra* Part IV.C.2.

<sup>328</sup> See *infra* text accompanying notes 329-52.

retirement program at issue allowed employees age fifty and older who had also worked a certain number of years to collect benefits.<sup>329</sup> The plaintiffs, ages forty to forty-nine, challenged the program as a violation of the ADEA.<sup>330</sup> Aside from reversing the district court, the Seventh Circuit had two alternative means of disposing of the case.<sup>331</sup> First, the court could have affirmed the district court's decision that the early retirement program was a bona fide benefit plan.<sup>332</sup> Second, the court could have entirely rejected the plaintiffs' reverse discrimination argument on the grounds that the ADEA did not allow relief for victims of reverse discrimination.<sup>333</sup> By jumping directly to the later of these two theories without carefully considering the ADEA's language, history, or policy, the Seventh Circuit neglected to conduct the careful analysis the Act demands and attempted to create the type of generalized prohibition that the statute's history explicitly rejects.<sup>334</sup>

The Seventh Circuit did not err in its initial finding that the ADEA does not always protect younger employees as well as it protects those workers who are relatively older.<sup>335</sup> The ADEA allows preferential treatment of relatively older employees in certain designated situations, such as when an employer establishes a minimum age for pension benefits.<sup>336</sup> However, the Seventh Circuit did not reach its conclusion through an analysis of the exceptions found in § 623 of the Act.<sup>337</sup> Rather, the court supported its conclusion on a policy assumption of the court's creation that Congress could not have intended younger members of the protected group to have a cause of action against an employer who favors older members of the group.<sup>338</sup> This basic assumption runs contrary to the actual policy Congress was seeking to

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<sup>329</sup> See *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1227 (7th Cir. 1992).

<sup>330</sup> *Id.*

<sup>331</sup> See *infra* text accompanying notes 332-33.

<sup>332</sup> *Hamilton*, 966 F.2d at 1227. Several other courts have avoided addressing the validity of reverse age discrimination by utilizing the exceptions in the Act, such as the bona fide benefit plan exception. See *supra* note 105 and accompanying text. For a summary of the exceptions in the Act, see *supra* text accompanying notes 50-52 and notes 226-27 and accompanying text.

<sup>333</sup> *Hamilton*, 966 F.2d at 1228. The court chose this approach. *Id.*

<sup>334</sup> See *infra* text accompanying notes 335-48.

<sup>335</sup> Cf. *supra* notes 226-33 and accompanying text. Within § 623, Congress established several exceptions that permit employers to preference relatively older members of the protected group. See *supra* notes 50-52 and accompanying text.

<sup>336</sup> See *supra* note 335.

<sup>337</sup> See *Hamilton*, 966 F.2d 1226.

<sup>338</sup> *Id.* at 1227-28.

implement with the ADEA: the elimination of arbitrary age discrimination that obstructs the ability of workers age forty and older to find and retain gainful employment.<sup>339</sup>

In an attempt to be consistent with its narrow interpretation of the ADEA's policy goals, the Seventh Circuit further erred by placing a limiting construction on the EEOC regulation interpreting the Act and on the text of the ADEA itself.<sup>340</sup> The textual language of the statute unequivocally rejects discrimination against any individual over age forty because of age.<sup>341</sup> Yet the court ignores principles of statutory interpretation by placing undue emphasis on the references to "older workers" and "older persons" in the ADEA preamble to limit the Act's prohibitive mandate to reach only arbitrary discrimination against relatively older individuals.<sup>342</sup> The court's finding that regulation 1625.2(a) exceeds the scope of the ADEA when applied in favor of a relatively younger plaintiff naturally follows from such a stifled reading of the statute.<sup>343</sup>

In enacting the ADEA, Congress recognized that age discrimination claims must be evaluated on a case-by-case basis because of the many ways in which discrimination can occur.<sup>344</sup> With the OWBPA amendments to the Act, Congress designated specific circumstances in which employers can make age-based decisions.<sup>345</sup> Congress also emphasized the narrowness of these exceptions.<sup>346</sup> In *Hamilton*, the Seventh Circuit sidesteps Congress' case-by-case instruction in favor of a roughly drawn prohibition on reverse discrimination claims that looks not at the motivation of the employer, but on the relative ages of the advantaged and disadvantaged workers.<sup>347</sup> In so doing, the Seventh

<sup>339</sup> See *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 473-75 (6th Cir. 2002) (Cole, J., concurring), cert. granted, 123 S. Ct. 1786 (2003). As a practical matter, a fifty-year-old may have equal difficulty as a fifty-five-year-old in finding employment. *Id.* at 474. For a discussion of how including reverse discrimination claims can best effectuate the purposes of the ADEA, see *supra* Part IV.A.3.

<sup>340</sup> See *infra* notes 341-48 and accompanying text.

<sup>341</sup> See *supra* Part IV.A.1.

<sup>342</sup> See *Hamilton*, 966 F.2d at 1227. The court reaches this conclusion even as it acknowledges that the language of the statute supports reverse discrimination claims. *Id.* at 1228.

<sup>343</sup> *Id.* at 1227-28.

<sup>344</sup> See *supra* note 60 and accompanying text.

<sup>345</sup> See *supra* notes 51, 228-33 and accompanying text.

<sup>346</sup> See *supra* notes 50-52 and accompanying text.

<sup>347</sup> See *Hamilton*, 966 F.2d at 1227-28; see also *supra* note 175 (quoting the *Cline* court's analysis of the statutory reading resulting from the *Hamilton* opinion).

Circuit mischaracterizes the ADEA prohibition against age-based decisions.<sup>348</sup>

Despite the Seventh Circuit's faulty reasoning, the court's refusal to grant the plaintiffs relief was still a correct result.<sup>349</sup> The early retirement program did not tie benefits solely to age, but rather granted benefits based on a combination of years of employment plus age.<sup>350</sup> As such, the district court found the program to be a bona fide employee benefit plan covered by § 623(f)(2) of the Act.<sup>351</sup> The Seventh Circuit did not need to go beyond the § 623(f)(2) exception to conclude that the reverse discrimination claim of the *Hamilton* plaintiffs must fail.<sup>352</sup>

## 2. Sixth Circuit

Whereas the early retirement program at issue in *Hamilton* combined age and years worked to determine benefits, the CBA provision facing the Sixth Circuit in *Cline* awarded benefits based on age alone.<sup>353</sup> Yet rather than considering whether this age-based provision can be upheld under any of the exceptions found in the ADEA § 623, the Sixth Circuit's *Cline* opinion focuses primarily on whether the Act allows reverse discrimination in general.<sup>354</sup> Although the court's analysis lacks consideration of the ADEA exceptions, the majority and concurring opinions in *Cline* provide a nearly complete summary of the steps a court should take to analyze a reverse discrimination challenge under the ADEA.<sup>355</sup>

The Sixth Circuit appropriately looked to the language of the ADEA itself to determine whether the Act supports reverse discrimination.<sup>356</sup> The court first utilized tools of statutory interpretation to evaluate the scope of and reconcile any potential inconsistencies in the Act's

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<sup>348</sup> Compare the result illustrated in note 175 *supra*, with the analysis in Part IV.A.1 *supra*.

<sup>349</sup> See *infra* notes 350-52 and accompanying text.

<sup>350</sup> See *Hamilton*, 966 F.2d at 1227.

<sup>351</sup> *Id.*

<sup>352</sup> See *supra* text accompanying notes 350-51; see also CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Minimalism is the concept that a court should decide the case before it on the narrowest grounds. SUNSTEIN, *supra*, at ix-x. A majority of the Justices on the current Supreme Court support minimalism. *Id.* at xi-xiii.

<sup>353</sup> See *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 468 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

<sup>354</sup> See *id.* at 467-72.

<sup>355</sup> See *infra* text accompanying notes 356-64.

<sup>356</sup> See *infra* text accompanying notes 357-59; *supra* Part IV.A.



language.<sup>357</sup> Rather than forcing the language to reflect court policy, the Sixth Circuit's finding that the text unambiguously prohibited discrimination against any individual over the age of forty ultimately came from a resolution of the pertinent sections of the statute with the language of the Act's preamble.<sup>358</sup> This reading of the language is consistent with the text of regulation 1625.2(a) and required no limiting construction of the regulation such as that established by the Seventh Circuit.<sup>359</sup>

The concurrence of Judge Cole supplements the majority opinion by placing it within the context of the policy effectuated by the Act.<sup>360</sup> Judge Cole's opinion acknowledges the dual purposes of the ADEA and illustrates how preventing arbitrary discrimination could only be realized through enabling any plaintiff within the protected group to challenge an age-based decision.<sup>361</sup> Judge Cole's concurrence also provides an essential explanation of the role of the Supreme Court's *O'Connor* holding to reverse discrimination claims.<sup>362</sup>

Between Cole's consideration of policy and Supreme Court precedent, and the majority's analysis of the ADEA's text, the Sixth Circuit creates a harmonious interpretation of the ADEA that stays true to the remedial spirit of the statute.<sup>363</sup> This approach to the ADEA lays the foundation for the development of model judicial reasoning for courts faced with a fact pattern involving reverse age discrimination within the protected class.<sup>364</sup>

## V. EFFECTUATING THE REMEDIAL PURPOSES OF THE ADEA

This Note illustrates that reverse discrimination should pose no obstacle to a plaintiff challenging workplace age discrimination.<sup>365</sup> Nevertheless, the ADEA's general accommodation of reverse

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<sup>357</sup> See *Cline*, 296 F.3d at 468-72.

<sup>358</sup> *Id.*

<sup>359</sup> Compare *id.* at 471, with *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1227-28 (7th Cir. 1992).

<sup>360</sup> See *Cline*, 296 F.3d at 472-77 (Cole, J., concurring).

<sup>361</sup> *Id.* at 472-75. Judge Cole illustrates how 29 U.S.C. § 623(l)(1)(A) would be rendered useless by the *Hamilton* interpretation of the Act. *Id.* at 473; see also notes 225-27 and accompanying text.

<sup>362</sup> See *Cline*, 296 F.3d at 475-76 (Cole, J., concurring).

<sup>363</sup> See *supra* text accompanying notes 356-62, Part IV.A.3.

<sup>364</sup> See *infra* Part V.

<sup>365</sup> See *supra* Part IV.

discrimination as a theory of recovery does not excuse a court from considering reverse discrimination claims under the same careful, individualized analysis Congress requires for all ADEA claims.<sup>366</sup> A more methodological approach to reverse discrimination claims than that displayed by the Seventh Circuit in *Hamilton* would protect employers from meritless complaints while enabling true victims of age-based discrimination to obtain relief.<sup>367</sup>

When faced with a scenario that suggests reverse age discrimination within the protected class, a court should first consider whether the employer action at issue is based on age alone.<sup>368</sup> If so, the court should next consider whether the employer's action fits within any of the exceptions outlined in § 623.<sup>369</sup> As courts' current reliance on these exceptions indicates, § 623 already provides a functional filter for the great majority of employer actions that have an age-based component.<sup>370</sup> Only if the action has no other justification beyond the exceptions within the statute should the court grant relief to a reverse discrimination plaintiff.<sup>371</sup> With this careful method of review, the judicial system will

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<sup>366</sup> See *supra* note 60 and accompanying text.

<sup>367</sup> See *infra* text accompanying notes 368-72.

<sup>368</sup> For an example of this analysis, see *supra* notes 268-72 and accompanying text. The courts are in disagreement as to whether the ADEA also acknowledges disparate impact as a basis of recovery. See *supra* note 74.

<sup>369</sup> See *supra* notes 50-52, 226 and accompanying text. A discussion of the factors guiding a determination of whether an employer's age-based action meets one of the ADEA exceptions is beyond the scope of this Note. See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 124 (1985) (finding that a transfer system that discriminated based on age was not a bona fide seniority system and discussing the bona fide occupational qualification exception); *Raskin v. The Wyatt Co.*, 125 F.3d 55, 61-62 (2d. Cir. 1997) (finding a bona fide employee benefits program); *Hiatt v. United Transp. Union*, 65 F.3d 838, 842-43 (10th Cir. 1995) (finding a system that treats workers equally and awards work based on length of service is a bona fide seniority system); *Henn v. Nat'l Geographic Soc'y*, 819 F.2d 824, 826-27 (7th Cir. 1987) (providing examples of bona fide seniority systems); Tracy Karen Finkelstein, Note, *Judicial and Administrative Interpretations of the Bona Fide Occupational Qualification as Applied to the Age Discrimination in Employment Act*, 40 CLEV. ST. L. REV. 217 (1992); James Lockhart, Annotation, "Bona Fide Seniority System" Exception to General Prohibition of Age Discrimination in Employment (29 U.S.C.A. § 623(f)(2)(A)), 177 A.L.R. FED. 415 (2002); James Lockhart, Annotation, "Bona Fide Employee Benefit Plan" Exception to General Prohibition of Age Discrimination in Employment Act (29 U.S.C.A. § 623(f)(2)(B)) as Applied to Early Retirement Incentive Plans," 176 A.L.R. FED. 115 (2002).

<sup>370</sup> See *supra* notes 105-06 and accompanying text.

<sup>371</sup> See *supra* note 51 (discussing the OWBPA amendments as Congress' statement that virtually all forms of employment discrimination violate the ADEA). With OWBPA, Congress emphasized the narrow grounds on which an age-discriminatory action might be upheld. See *supra* notes 228-33 and accompanying text.

achieve an appropriate balance between respecting employer freedom and promoting the remedial purposes of the Act.<sup>372</sup>

## VI. CONCLUSION

The ADEA is a remedial statute written to protect all individuals over age forty from discrimination in the workplace on the basis of age.<sup>373</sup> Allowing plaintiffs within the Act's protected group to recover under a theory of reverse discrimination is not counterintuitive to this goal. Rather, reverse age discrimination claims perform the essential function of ensuring that *all* workers protected by the ADEA, and not just those workers who are relatively older than the favored individual or group, have recourse from unlawful age-based employment systems.<sup>374</sup> Only through acceptance of reverse discrimination as a theory of recovery and careful analysis of each claim can courts truly protect individuals over age forty from the arbitrary discrimination that inspired Congress to enact the ADEA.<sup>375</sup>

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<sup>372</sup> See generally *supra* Part IV.

<sup>373</sup> See *supra* Part II.A-B.

<sup>374</sup> See *supra* Part IV.

<sup>375</sup> See *supra* Parts I.A., IV.